

Gregg M. Galardi, Esq.
Ian S. Fredericks, Esq.
SKADDEN, ARPS, SLATE, MEAGHER &
FLOM LLP
One Rodney Square
PO Box 636
Wilmington, Delaware 19899-0636
(302) 651-3000

Dion W. Hayes (VSB No. 34304)
Douglas M. Foley (VSB No. 34364)
MCGUIREWOODS LLP
One James Center
901 E. Cary Street
Richmond, Virginia 23219
(804) 775-1000

- and -

Chris L. Dickerson, Esq.
SKADDEN, ARPS, SLATE, MEAGHER &
FLOM LLP
155 N. Wacker Drive, Suite 2700
Chicago, Illinois 60606-1720
(312) 407-0700

Counsel to the Debtors and
Debtors in Possession

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

- - - - -	x
In re:	: Chapter 11
	:
CIRCUIT CITY STORES, INC.,	: Case No. 08-35653
<u>et al.</u> ,	:
	:
Debtors.	: Jointly Administered
- - - - -	x

APPENDIX TO REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY
JUDGMENT WITH RESPECT TO CERTAIN CLAIMS SUBJECT TO (I) THE
DEBTORS' NINETEENTH OMNIBUS OBJECTION TO CLAIMS
(RECLASSIFICATION OF CERTAIN MISCLASSIFIED CLAIMS TO GENERAL
UNSECURED, NON-PRIORITY CLAIMS) AND (II) THE DEBTORS'
THIRTY-THIRD OMNIBUS OBJECTION TO CLAIMS (MODIFICATION
AND/OR RECLASSIFICATION OF CERTAIN CLAIMS)

Dated: January 13, 2010
Richmond, Virginia

SKADDEN, ARPS, SLATE, MEAGHER &
FLOM LLP
Gregg M. Galardi, Esq.
Ian S. Fredericks, Esq.
P.O. Box 636
Wilmington, Delaware 19899-0636
(302) 651-3000

- and -

SKADDEN, ARPS, SLATE, MEAGHER &
FLOM LLP
Chris L. Dickerson, Esq.
155 N. Wacker Drive, Suite 2700
Chicago, Illinois 60606-2700
(312) 407-0700

- and -

MCGUIREWOODS LLP

/s/ Douglas M. Foley
Dion W. Hayes (VSB No. 34304)
Douglas M. Foley (VSB No. 34364)
One James Center
901 E. Cary Street
Richmond, Virginia 23219
(804) 775-1000

Counsel for Debtors and Debtors
in Possession

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EXHIBIT A

Gregg M. Galardi, Esq.
Ian S. Fredericks, Esq.
SKADDEN, ARPS, SLATE, MEAGHER &
FLOM, LLP
One Rodney Square
PO Box 636
Wilmington, Delaware 19899-0636
(302) 651-3000

Dion W. Hayes (VSB No. 34304)
Douglas M. Foley (VSB No. 34364)
MCGUIREWOODS LLP
One James Center
901 E. Cary Street
Richmond, Virginia 23219
(804) 775-1000

- and -

Chris L. Dickerson, Esq.
SKADDEN, ARPS, SLATE, MEAGHER &
FLOM, LLP
333 West Wacker Drive
Chicago, Illinois 60606
(312) 407-0700

Proposed Counsel to the Debtors
and Debtors in Possession

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

- - - - -	- - - - -	x
	:	
In re:	:	Chapter 11
	:	
CIRCUIT CITY STORES, INC.,	:	Case No. 08-35653-KRH
<u>et al.</u> ,	:	
	:	
Debtors.	:	Jointly Administered
- - - - -	- - - - -	x

**FINAL ORDER UNDER BANKRUPTCY CODE SECTIONS 105(a), 362,
503(b), 507(a), 546(c), AND 546(h) (I) GRANTING
ADMINISTRATIVE EXPENSE STATUS TO OBLIGATIONS FROM
POSTPETITION DELIVERY OF GOODS; (II) AUTHORIZING PAYMENT
OF EXPENSES IN THE ORDINARY COURSE OF BUSINESS;
(III) AUTHORIZING DEBTORS TO RETURN GOODS; AND
(IV) ESTABLISHING PROCEDURES FOR RECLAMATION DEMANDS**

Upon the motion (the "Motion")¹ of the Debtors
for an order pursuant to Bankruptcy Code sections
105(a), 362, 503(b), 507(a), 546(c), and 546(h),
(i) confirming the grant of administrative expense status

¹ Capitalized terms not otherwise defined herein shall have the meanings ascribed to such terms in the Motion.



to obligations arising from postpetition delivery of goods; (ii) establishing authority to pay certain expenses in the ordinary course of business; (iii) authorizing the Debtors to return goods to vendors under Bankruptcy Code section 546(h); and (iv) establishing procedures for addressing reclamation demands; and the Court having reviewed the Motion and the Besanko Declaration; and the Court having determined that the relief requested in the Motion is in the best interests of the Debtors, their estates, their creditors, and other parties in interest; and it appearing that proper and adequate notice of the Motion has been given and that no other or further notice is necessary; and upon the record herein; and after due deliberation thereon; and good and sufficient cause appearing therefor, it is hereby

ORDERED, ADJUDGED, AND DECREED that:

1. The Motion is GRANTED, as set forth herein.
2. The Vendors shall have administrative expense claims with priority under Bankruptcy Code sections 503(b) and 507(a)(2) for those undisputed obligations arising from outstanding orders relating to

shipments of Goods delivered, received, and accepted by the Debtors after the Petition Date, subject to the limitations imposed by any order of this Court and the prior rights of holders of security interests in such Goods or the proceeds of such Goods under the Debtors' proposed debtor in possession financing agreements and prepetition financing agreements, to the extent of such interests.

3. The Debtors are authorized, but not directed, to pay their undisputed obligations arising from the postpetition shipment or delivery of Goods by the Vendors under their customary practice in the ordinary course before the commencement of these chapter 11 cases.

4. The Debtors are authorized, but not obligated, under Bankruptcy Code section 546(h), with the consent of a creditor and subject to the limitations imposed by any orders of this Court and the prior rights of holders of security interests in such Goods or the proceeds of such Goods under the Debtors' proposed debtor in possession financing agreements and prepetition financing agreements, to the extent of such

interests, to return to Vendors Goods that were delivered prepetition for an offset of the purchase price of such Goods against the Vendors' prepetition claims; provided, however, that nothing herein shall be construed as a waiver of, or in any way prejudice, any rights the Debtors may have, after notice and a hearing and subject to court approval, to return goods without creditor consent.

5. The procedures for the processing and reconciliation of Reclamation Claims, if any, set forth in the Motion, including the following are hereby approved:

- (a) Any person making a Reclamation Demand (the "Reclamation Claimant") must send the Reclamation Demand so it is received by the Debtors no later than the day that is twenty (20) days following the Petition Date or such earlier time as may be required under Bankruptcy Code section 546(c) to the following addressees: Circuit City Stores, Inc., et al., Claims Processing, c/o Kurtzman Carson Consultants LLC, 2335 Alaska Avenue, El Segundo, CA 90245, with separate copies to each
 - (i) Circuit City Stores, Inc. 9950 Mayland Drive, Richmond, Virginia 23233, Attn: Reginald D. Hedgebeth,
 - (ii) Circuit City Stores, Inc. 9950 Mayland Drive, Richmond, Virginia 23233, Attn: Daniel W. Ramsey,

(iii) Skadden, Arps, Slate, Meagher & Flom LLP, 333 West Wacker Drive, Chicago, Illinois, 60606, Attn: Sarah Baker, Esq., and (iv) McGuireWoods LLP, One James Center, 901 E. Cary Street, Richmond, Virginia 23219, Attn: Sarah B. Boehm, Esq.

- (b) All Reclamation Demands must include the information required by Bankruptcy Code Section 546(c) with respect to the Goods for which the Reclamation Demand is asserted, and the following: (i) a statement by the claimant as to whether they have or will assert an administrative claim pursuant to Bankruptcy Code section 503(b)(9) for the value of goods the claimant provided to the Debtors within the twenty (20) days immediately prior to the Petition Date (a "Section 503(b)(9) Claim") and (ii) to the extent known, the amount of any Section 503(b)(9) Claim.
- (c) On or before the day that is one hundred and twenty (120) days following the Petition Date, the Debtors shall advise each Reclamation Claimant of the allowed amount, if any, of the Reclamation Demand (the "Allowed Reclamation Amount"). Absent receipt of any notice setting forth such an Allowed Reclamation Amount, the Debtors shall be deemed to have rejected the Reclamation Demand.
- (d) In the event that the Debtors and the Reclamation Claimant agree upon the Allowed Reclamation Amount, the Debtors shall be authorized to make payment in such amount or be

required to return the goods sought to be reclaimed, subject to the limitations imposed by any orders of this Court and the prior rights of holders of security interests in such goods.

6. Nothing in this Order or the above procedures is intended to prohibit, hinder, or delay any Reclamation Claimant from asserting or prosecuting any of its rights to seek to reclaim goods provided to the Debtors, or affect, alter, diminish, extinguish, or expand the rights or interests, if any, to recover goods (or proceeds thereof) sought to be reclaimed, subject to the provisions of Bankruptcy Code sections 105, 362, and 546(c), or from filing a claim under Bankruptcy Code section 503(b)(9) consistent with applicable orders of this Court.

7. Nothing in this Order shall impair or expand any entity's right, if any, to withdraw a reclamation claim; provided, however, that all of the Debtors' rights with respect to the withdrawal of any reclamation claim, including (without limitation) the right to contest whether the entity had the right to withdraw such claim, are expressly reserved.

8. The requirement under Local Bankruptcy Rule 9013-1(G) to file a memorandum of law in connection with the Motion is hereby waived.

9. This Court retains jurisdiction to hear and determine all matters arising from or related to the implementation or interpretation of this order.

Dated: Richmond, Virginia
December __, 2008
Dec 10 2008

/s/ Kevin Huennekens

UNITED STATES BANKRUPTCY JUDGE

Entered on Docket: December 11 2008

WE ASK FOR THIS:

Gregg M. Galardi, Esq.
Ian S. Fredericks, Esq.
SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP
One Rodney Square
PO Box 636
Wilmington, Delaware 19899-0636
(302) 651-3000

- and -

Chris L. Dickerson, Esq.
SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP
333 West Wacker Drive
Chicago, Illinois 60606
(312) 407-0700

- and -

/s/ Douglas M. Foley
Dion W. Hayes (VSB No. 34304)
Douglas M. Foley (VSB No. 34364)
MCGUIREWOODS LLP
One James Center
901 E. Cary Street
Richmond, Virginia 23219
(804) 775-1000

Proposed Counsel to the Debtors
and Debtors in Possession

CERTIFICATION OF ENDORSEMENT UNDER LOCAL RULE 9022-1(C)

Pursuant to Local Bankruptcy Rule 9022-1(C), I
hereby certify that the foregoing proposed order has
been endorsed by or served upon all necessary parties.

/s/ Douglas M. Foley

EXHIBIT B

1 UNITED STATES BANKRUPTCY COURT
2 FOR THE EASTERN DISTRICT OF VIRGINIA
3 RICHMOND DIVISION
4
5
6 -----
7)
8)
9 IN RE:)
10 CIRCUIT CITY, INC., et al) Case No.08-35653-KRH
11)
12)
13)
14 -----
15
16 Complete transcript of the testimony and
17 other incidents in the above, when heard on November
18 10, 2008, before the Honorable Kevin R. Huennekens,
19 Judge.
20
21
22
23
24
25

1 APPEARANCES:

2 MCGUIREWOODS, LLP
3 901 East Cary Street
4 Richmond, Virginia 23219
5 Counsel for debtors
6 Counsel for debtors
7 BY: DION W. HAYES, Esq.

8 SKADDEN ARPS SLATE & FLOM, LLP
9 One Rodney Square
10 P.O. Box 636
11 Wilmington, DE 19899
12 Counsel for debtors
13 By: GREGG M. GALARDI, Esq.

14 RUSSELL R. JOHNSON, III, Esq.
15 2258 Wheatlands Drive
16 Manakin-Sabot, Virginia 23103
17 Representing various utilities

18 JOSEPH ATHANOS, Esq.
19 Counsel for Gordon Brothers and Hilco

20 BRADFORD F. ENGLANDER, Esq.
21 7200 Wisconsin Avenue
22 Suite 800
23 Bethesda, MD 20814-4842
24 Representing Alliance Corporation Source Interlink
25 Media, LLC

ROBERT L. LEHANE, Esq.
101 Park Avenue
New York, NY 10178-0002
Representing various landlords

BRUCE H. MATSON, Esq.
951 E Byrd Street
Richmond, Virginia 23219
Representing Bank of America and its agent

ROBERT VAN ARSDALE, Esq.
Assistant United States Trustee
600 East Main Street, Suite 301
Richmond, Virginia 23219

1 TELEPHONIC APPEARANCES:

2 DAVID L. POLLACK, Esq.
3 1735 Market Street
4 51st Floor
5 Philadelphia, PA 19103-7599

6 STEVEN CHURCH
7 Bloomberg News

8 MR. GRAFF

9 DUSTIN P. BRANCH, Esq.
10 2029 Century Park East
11 Suite 2600
12 Los Angeles, CA 90067-3012
13 Representing various landlords

14 DAVID M. HILLMAN, Esq.
15 919 Third Avenue
16 New York, New York 10022
17 Representing Panasonic Corporation

18 JOHN MCJUNKIN, Esq. and DANIEL J. CARRIGAN, Esq.
19 1900 K Street NW
20 Washington, D.C. 20006-1108
21 Representing Bethesda Softworks, LLC

22 JOHN E. LUCIAN, Esq. and REGINA S. KELBON, Esq.
23 130 North 18th Street
24 Philadelphia, PA 19103-6998
25 Representing Verizon Wireless

1 THE CLERK: In the matter of Circuit
2 City Stores, Incorporated, et al, hearings,
3 first day motions by debtors item 1 through
4 24.

5 MR. HAYES: Good afternoon, Your
6 Honor.

7 THE COURT: Good afternoon,

8 MR. HAYES: Dion Hayes with McGuire
9 Woods on behalf of the debtors. First of
10 all, Your Honor, we want to thank the Court
11 very much for hearing these matters on an
12 expedited basis. It is very important to the
13 company that we be able to have an
14 opportunity to speak to Your Honor as soon as
15 we could after the case was filed, and the
16 company is very appreciative. Your Honor --

17 THE COURT: You're certainly
18 welcome.

19 MR. HAYES: Your Honor, if I could,
20 I would like to introduce to the Court
21 certain of the individuals that are in the
22 courtroom today that I think the Court will
23 be seeing more of in the future. Your Honor,
24 first of all Mr. Reggie Hedgebeth is Circuit
25 City's general counsel. Seated next to him

1 is or on the same row is Bruce Besanko who is
2 the company's chief financial officer. Jim
3 Marcum the acting chief executive officer,
4 would very much like to be here but he's at
5 headquarters spending time with the company's
6 employees at a very critical time in the
7 company's history. Your Honor, with me at
8 counsel table from Skadden Arps are Gregg
9 Galardi from Skadden's Wilmington, Delaware
10 office, Ian Fredericks, also from Skadden's
11 Wilmington, Delaware office. Seated next to
12 Mr. Hedgebeth is Chris Dickerson from
13 Skadden's Chicago office. Your Honor, I'm
14 going to move for the admission pro hac of
15 Skadden's attorneys who will present the
16 first days. Before I do that, I want to
17 address the one issue that the clerk's office
18 asked that we address with the Court this
19 morning. In all of the first day motions we
20 indicated at the end of our proposed orders
21 the required compliance with Rule 9022-1
22 related to orders. Your Honor, I wanted to
23 be specific as to who we sent notice to of
24 this hearing and the manner in which it was
25 sent. As the Court is well aware the filings

1 commenced late last night after midnight,
2 concluded in the 3 or 4 o'clock range, and at
3 approximately 4:30 this morning faxed notice
4 of the filing of the first day and notice of
5 the two websites, both the Court's website
6 and the KCC website, who is our claims agent,
7 were sent out to that fax list. Your Honor,
8 the entities that were on that fax list were
9 the top 50 unsecured creditors, the landlords
10 for the leases that we are proposing to
11 reject, and counsel for the prepetition
12 agent, counsel for Sony, the IRS, the SEC,
13 the secretary of treasury, the attorney
14 generals for all 50 states, the EPA, the
15 Department of Justice Civil Division, the
16 Virginia State Corporation Commission, the
17 Virginia Department of Tax, the county
18 recorder and county taxing authorities for
19 the jurisdictions in which the company would
20 propose to close stores, the governmental
21 units in those jurisdictions where the
22 company operates as well, regional and state
23 and environmental protection authority
24 offices and the state taxing authorities. We
25 also, Your Honor, had provided draft first

1 day papers on Friday to the U.S. Trustee's
2 Office, had an opportunity to meet this
3 morning with Mr. Van Arsdale and Mr.
4 Whitehurst to talk about first day motions.
5 Your Honor, we believe to all the major
6 constituents in this case they have had as
7 much notice as could reasonably be provided
8 under the circumstances and what we believe
9 to be adequate notice for the hearing on the
10 matters we're going to put before the Court.

11 Your Honor, at this time I would
12 like to move admission pro hac Gregg Galardi,
13 Chris Dickerson, Ian Fredericks with Skadden
14 Arps. They are admitted in jurisdictions
15 which they practice and we believe well
16 qualified to practice in this Court.

17 THE COURT: Admissions are approved.
18 Welcome to the court.

19 MR. POLLACK: Your Honor, the
20 people on the phone are having trouble
21 hearing the speakers in the courtroom. I
22 don't know if there is anything we can do
23 about that, but we hear you fine.

24 THE COURT: Very good. I will see
25 if we can't turn up the volume on the phone.

1 We have just moved into a new
2 courtroom, new courthouse, and we don't have
3 all of the audio systems installed yet. So
4 we're still trying to get through that, but
5 we will try to accommodate the people on the
6 phone as much as we can. You may proceed.

7 MR. GALARDI: Your Honor, again, for
8 the record, Gregg Galardi, with Skadden Arps
9 on behalf of Circuit City. Your Honor, I
10 don't know what your practice is to
11 proceed -- I know there is a number of out of
12 state counsel -- whether you would like to
13 have those admission introductions before we
14 proceed with these matters or wait until they
15 stand up.

16 THE COURT: I think we can wait
17 until they stand up because there may be
18 people who want to speak to specific motions
19 and not others. Do you want the people who
20 are by telephone to identify themselves
21 before we proceed with the hearing?

22 MR. GALARDI: That would be helpful,
23 Your Honor.

24 THE COURT: At this point I would
25 like to turn to the people participating by

1 telephonic hearing today and have each of you
2 identify yourself.

3 Mr. Church, would you please
4 identify yourself.

5 MR. CHURCH: Steven Church of
6 Bloomberg News.

7 THE COURT: Mr. Pollack, would you
8 please identify yourself?

9 MR. POLLACK: Good afternoon. David
10 Pollack, Ballard Spahr and Ingersoll on
11 behalf of certain landlords; also on the
12 phone from our Washington office is Chuck
13 Chotvacs, and I know Mr. Galardi can speak
14 louder than he is.

15 THE COURT: Thank you. Ms. Graff,
16 would you identify yourself?

17 MR. GRAFF: Actually, Your Honor,
18 it's Mr. Graff --

19 THE COURT: I apologize.

20 MR. GRAFF: -- on behalf of
21 (inaudible).

22 THE COURT: Mr. Branch, would you
23 identify yourself?

24 MR. BRANCH: Good afternoon, Your
25 Honor. Dustin Branch, Katten Muchin &

1 Rosenman, LLP, appearing on behalf of various
2 landlords.

3 THE COURT: Mr. Hillman, would you
4 identify yourself?

5 MR. HILLMAN: Yes, Your Honor.
6 David Hillman of Schulte, Roth and Zable on
7 behalf of Panasonic Corporation of North
8 America.

9 THE COURT: All right. Thank you
10 and Mr. McJunkin, can you identify ourselves?

11 MR. MCJUNKIN: John McJunkin,
12 McKenna, Long and Aldridge. Along with me is
13 Dan Carrigan. We represent Bethesda
14 Softworks, LLC.

15 THE COURT: All right. Is there
16 anybody on the phone that I have not
17 mentioned?

18 MR. LUCIAN: Good morning -- good
19 afternoon, Your Honor, John Lucian and Regina
20 Kelbon from Blank Rome. We represent Verizon
21 Wireless.

22 THE COURT: All right. Is there
23 anybody else? All right. Thank you.

24 MR. GALARDI: Thank you, Your Honor,
25 and I will try to speak up and not yell at

1 Mr. Pollack. Your Honor, we are here today
2 with respect to the Circuit City filings, and
3 what I would like to do is give Your Honor an
4 introduction to why we are here, what the
5 corporate structure is, and I have three
6 handouts that we would make available to
7 people if I might approach, Your Honor.

8 THE COURT: Certainly.

9 MR. GALARDI: Your Honor, just
10 briefly by way of introduction, Circuit City
11 was founded in 1949 here in Richmond. It is
12 a public company with operation throughout
13 the United States, Canada and Puerto Rico.
14 What I have handed up to Your Honor is three
15 documents, and as we go through today's
16 hearings I find them -- hopefully they will
17 be useful for a person to understand where we
18 are. One is a DIP budget and one is also a
19 timetable for where we see this case is
20 going. The first document is the document
21 that will show the debtors that have actually
22 filed. You should have a document that has
23 white blocks, sort of gray shade and a darker
24 gray shade. The white blocks are the
25 debtors, the shaded ones are non-debtors, and

1 then the dark ones are entities that actually
2 filed in Canada today. We do commence CCAA
3 proceedings.

4 Your Honor, Circuit City Stores is a
5 publicly held company. It has gotten notice
6 of delisting. It has -- everyone knows is a
7 leading retailer of consumer electronics and
8 currently operates over 700 stores throughout
9 the United States, and it has a similar
10 number of stores that it operates up in
11 Canada. Today, as I said, they filed in
12 Canada the CCAA proceeding under InterTan and
13 another one of the companies that is on
14 during this structure is Tormelay (Ph)
15 Corporation filed a CCAA proceeding and
16 actually sought and went over to the judge
17 this morning. I understand we will hopefully
18 have an order entered there they will
19 approve. There is some interplay between
20 orders and financing. We're hopeful that
21 maybe before we finish today they will have
22 an order entered in Canada with respect to
23 the CCAA proceedings.

24 Your Honor, the revenues for year
25 ending February 29, 2008, were approximately

1 12 billion dollars and employed nearly 40,000
2 people. Your Honor, unfortunately over the
3 last two years they have had declining
4 performance and in the last six months ending
5 August 31st, as we reported, they have lost
6 over 400 million dollars. Simply speaking,
7 Your Honor, these losses are driven by two
8 general factors. First, the decreasing
9 margins in the company's operations. They
10 receive less margins on their sales partially
11 because they have chosen before to compete
12 with the internet such as Amazon.com;
13 therefore, in the stores they had lower
14 margins competing with the internet. The
15 second is simply they've lost foot traffic
16 over the last two to three years resulting
17 both from -- I would say general economic
18 conditions are more pertinent perhaps today
19 than two years ago but also customer
20 dissatisfaction. After -- back in January of
21 2008 the company received notice from its
22 largest shareholder they want to commence a
23 proxy fight from Wattles Capital. In May the
24 management agreed to reach an agreement with
25 Wattles regarding the proxy fight and for

1 three new members for the board to be
2 appointed. One is Mr. James Marcum, who
3 currently serves as the acting president, and
4 there were two other individuals who were
5 designated to the board who served on the
6 board through last night and are still on the
7 board today. In addition, Your Honor, during
8 that same period one of the complaints by the
9 shareholders was that the company should be
10 shopping itself and we received an offer from
11 Blockbuster. The company hired Goldman Sachs
12 to pursue that offer from Blockbuster.
13 Unfortunately a transaction was never
14 completed with Blockbuster. Goldman Sachs
15 probably three, four or five weeks ago
16 continued in its efforts to try to find TG
17 partners, equity investors or other people to
18 invest in the company. To date none of those
19 activities have in fact come to fruition.
20 Your Honor, after the proxy contest the
21 company's financial performance continued to
22 deteriorate. The current CEO at that time
23 stepped down and Mr. Marcum, as I said, took
24 on the position of acting president and
25 chairman. Since September, although the

1 company had already initiated various
2 restructuring efforts, at Mr. Marcum's
3 direction the company has been aggressively
4 pursuing various turnaround efforts. They
5 have been well publicized in the media to
6 note a few. First, the company has hired
7 various restructuring professionals to help
8 with the cash flows, to sort of monitor the
9 business and monitor the checkbook and has
10 been searching out alternative forms of
11 financing. Second, the company began a new
12 advertising campaign and initiatives to
13 improve the customer's experience. It used
14 to be the company competed with the internet,
15 Amazon, and, as I mentioned, the margins were
16 lower. So we have one low price now. We are
17 not going as low as Amazon. It is very hard
18 to compete with the internet when you have
19 virtually more in the stores. The company is
20 now one low price, same internet as in the
21 stores, but it is hopefully a higher market
22 product. They have also taken on great steps
23 to try to give the customers a much better
24 experience to try to get the customers back.
25 Customer satisfaction is perhaps at an all

1 time low and they have addressed that. Those
2 activities were announced and began in the
3 month of -- the end of September and
4 beginning of October. The company also took,
5 as it announced in September, a look at all
6 of its assets. In particular the company has
7 had approximately 150 leases which they have
8 not been operating in those stores for some
9 period of time. On an annual basis they have
10 therefore been paying approximately 40
11 million dollars of an annual rent on lease
12 space that they have no longer been operating
13 stores. Some of that was mitigated by the
14 fact that there were a couple of peas in
15 those facilities but none of the subleases
16 were greater than the market rent. They had
17 explored the opportunity to see if they could
18 shop those leases. Unfortunately they were
19 unable to do so. One of the motions, Your
20 Honor, is to finally bring in for the payment
21 of that amount and to reject those leases.
22 In addition, Your Honor, they looked at a
23 four-wall analysis, a very strict analysis of
24 what of the stores that they had, at the time
25 about 175 stores. What are the stores who

1 were best contributors? What markets were
2 the best contributors on an economic
3 analysis. They hired FTI, and FTI did a
4 four-wall analysis, the company did an
5 analysis of markets, and as a result of that
6 the company determined it was best to close
7 those stores and close those markets and no
8 longer operate. Again, one of the topics for
9 the motion, although we started that process
10 prior to the filing, is to seek approval of
11 the agent who is liquidating that inventory
12 and ultimately continue those store closings.
13 That is one of the motions, but that effort
14 was undertaken, begun really in the beginning
15 of October, and we will have testimony today,
16 if Your Honor needs it, with respect to
17 efforts to come to that agency agreement, how
18 we came to that, why it is a fair agreement,
19 what's the benefit of assuming it. But that
20 was one of the efforts undertaken pre-filing
21 again with the hopes to address our liquidity
22 concerns.

23 Finally, I think, Your Honor, most
24 familiar in people's mind, because it
25 happened only last week, the company took a

1 painful step last Thursday and Friday to have
2 a significant reduction in forces at
3 corporate headquarters. The number is
4 approximately 700 people in the company, let
5 those people go last Thursday and Friday as
6 was well covered in the press. Your Honor,
7 during all of this process the company was
8 soliciting offers, and Mr. Besanko can
9 testify as well as the advisors today -- we
10 can proffer or give their testimony. The
11 company has been looking at talking with its
12 current lenders lead by the agent Bank of
13 America. The company currently has, and,
14 again, a sign of a different time, a 1.3
15 billion dollar commitment financing from a
16 group of about 17 lenders, very well-known
17 retail lenders led by B of A, there's Wells
18 Fargo, there's GE, and then depending upon
19 whose bank is financing whose bank at any
20 given time, there are other banks within that
21 group. We started negotiations with them
22 about both out of court financing in-court
23 financing hoping to remain, again, out of
24 court. The company and its professional
25 advisors also went out and solicited a

1 subdebt. Your Honor may bring it up later,
2 one of the draft papers mentioned -- there
3 was a subdebt facility. We will tell the
4 story about why we do not have that facility
5 today. It is not that they walked away from
6 us. It is that we walked away from them. We
7 looked for subordinated debt and again trying
8 to get and solve the liquidity problem.
9 Notwithstanding the above, in light of the
10 quarterly announcement that came out
11 September 29th and the uncertainty in this
12 market created both in the global market as
13 well as the retail market, you can only read
14 the newspapers and see the retailers many
15 times, lenders became quite concerned about
16 the company's financial help. As a result of
17 this we are in the oddest time of the market
18 for retailers, especially an electronics
19 retailer, as we are building up our inventory
20 right -- we should be building up our
21 inventory. We are using more and more of our
22 credit facility. Unfortunately, we would
23 normally get increased trade terms or we
24 would get a higher credit limit from our
25 normal vendors, but given the market that was

1 going on and given the fact that there was
2 press in our quarterly report announcement of
3 400 million dollars lost for six months
4 ending on August 31, what we found happened
5 is after September the company began to
6 deteriorate its liquidity position primarily
7 because, one, vendors were stopping trade
8 terms and demanding cash in advance for
9 shorter terms, and, two, unlike historical
10 limits where we could increase our trade
11 credit with respect to those lenders and
12 therefore build our borrowing base and
13 therefore have more liquidity, we were unable
14 to do so because vendors were no longer
15 willing to go at risk. Again, the
16 traditional bankruptcy would merely remind
17 that we would only take their money, file on
18 January 1st that we were high and dry for the
19 payrolls, and so they decided not -- at least
20 we understand they decided not to continue to
21 give credit support to the company. As a
22 result of that and as a result we just
23 couldn't get enough cost as fast as was
24 necessary. We were required to come into
25 court and seek a filing last night and in

1 particular with the support of Bank of
2 America as it did the lending.

3 We have before Your Honor today
4 various first day motions. What are we
5 trying to establish in this filing? We read
6 the press this morning, Your Honor, and there
7 are experts that are saying, well, we will
8 take the fate of the lending and things of
9 every other retailer, we are going to
10 liquidate. Actually, quite simply we are
11 trying to emerge as a going concern and to do
12 it in one of two ways, and we have very
13 limited time as we talk through this process.
14 We are trying to emerge as a going concern
15 and there two ways that reach Chapter 11
16 allows us. One, a going concern based on a
17 particular sale to all or part of the
18 company. We can explain. It's just that
19 continuation in a different form from Goldman
20 Sachs. And, two, whether or not we can do
21 this is to emerge with a standalone plan
22 hopefully supported by vendors. As we set
23 forth in the Besanko affidavit, and as Your
24 Honor will hear as we go through the case, is
25 prior to the filing -- again, Mr. Marcum took

1 trips to Korea to try to discuss with vendors
2 whether they would support a vendor plan.
3 And the simple message is, Your Honor, the
4 company believes there is a competitive
5 market out there to Best Buy. You don't have
6 to compete with the internet. You provide a
7 valuable service. And if we get vendor
8 support sufficiently, you can have a second
9 outlet for your goods. And there are many
10 vendors that would be very much harmed should
11 Circuit City go out of business. That's one
12 avenue. And, two, though you have
13 significant interest during the Goldman Sachs
14 days, many of those buyers pointed to the
15 fact that we have a real estate portfolio of
16 150 leases that were debt store leases. So
17 we had a different footprint. So the
18 opportunity provided by Section 363, an asset
19 sale in bankruptcy, makes the company more
20 attractive to those bidders. So, Your Honor,
21 we really do hope we can accomplish a going
22 concern and exit from bankruptcy, and we want
23 to do it in very short time frame.

24 Your Honor, the second exhibit that
25 I have handed up to Your Honor, again, it is

1 available to people to give you an idea of
2 the time frame I think to try to set up the
3 whole case before we go to the first day
4 motions. Again, someone would look at our
5 DIP facility and say, my God, they have to
6 have a plan of reorganization done by March
7 and they have to do this, that and the other
8 thing.

9 THE COURT: That was the first thing
10 that stuck out to me.

11 MR. GALARDI: Right, exactly. And
12 why would anybody borrow so much money on
13 such a short time frame? Unfortunately, I
14 have done a number of retail cases, Your
15 Honor, and I would like to blame this one on
16 the banks but I really can't. It is the
17 Bankruptcy Code that actually forces this
18 situation, it seems to me, with the BAPCPA.
19 Your Honor, in a traditional ABL loan what
20 the ABL lenders are obviously concerned about
21 is their primary collateral is the inventory
22 in the stores. If your primary collateral is
23 the inventory in the stores, you get an
24 appraisal for inventory in the stores, and
25 the appraisal is based on the simple fact if

1 you have to liquidate, an order of
2 liquidation, how much can you get for that
3 inventory over a certain period of time.
4 That appraisal predicts essentially it will
5 take 9 to 12 weeks to liquidate the inventory
6 in the stores. If you take the timeline,
7 Your Honor, then the bankruptcy code overlay
8 of that is simply the following: as the
9 debtor you have your first 120 days to assume
10 or reject leases. You can get one extension
11 for 90 days, and if you get the 210 days to
12 assume or reject leases, you've got as long
13 as you can get unless you get in this
14 instance another 500 landlords to consent to
15 further extensions. So what you have is if
16 you take 210 days as the longest period, what
17 you find -- and I now have three or four
18 cases of this sort. Well, if you start
19 backwards from 210 days and it takes three
20 months to liquidate the inventory, well,
21 that's seven months minus three months and
22 you have a four month case because no retail
23 debtor is going to start assuming leases
24 until they know where they can exit because
25 the obvious implication is you have now

1 converted the cure claims. You have to make
2 administrative claims. So the time frame is
3 really not set by, I think, the lenders,
4 although I understand their concern and we
5 would love to have more time. It is the
6 Bankruptcy Code that really sets the 100, 210
7 days. So what you will see in a timetable
8 that we have proposed is where we see a
9 significant event over the course of this
10 case, Your Honor, is though we have the first
11 120 days -- you have 120 days, you take three
12 months. We have one month really to get a
13 new order in this case. So we will be filing
14 a motion which is not unheard of anymore but
15 it may not be usual for retail cases to
16 extend the 365(d)4 deadline the first month
17 of this case because if we don't, then the
18 lease reserves kick in. So you will notice
19 the first real deadline here is by December
20 10th we will have to have an order that will
21 allow us to go through the two to take
22 advantage of the full 210 days. The
23 landlords' counsel in the room have been with
24 me before on these matters, Mr. Pollack and
25 Mr. Hayes. They understand that's what we

1 will be doing and we will have a negotiation
2 over that, but it is critical to these
3 debtors that they get that extension and so
4 we will have a hearing on that. In addition,
5 Your Honor, the critical deadline is the
6 utilities. A company that has this many
7 leases has thousands and thousands of
8 utilities. The Bankruptcy Code again has
9 made it very difficult on retail companies
10 because you have the choices of either put up
11 and then get back or not put up. So what
12 we've done, and we will talk about this in
13 the first day motions, is we will make an
14 offer but we really need a hearing on that
15 first 30 days to have Your Honor set the
16 adequate assurance of future performance. I
17 know the gentleman who will probably be here
18 from this area, Mr. Russ Jones, will send me
19 my e-mail and tell me I won't accept this,
20 and we understand we will have to deal with
21 that but we normally resolve it. But that's
22 another thing that puts an incredible burden
23 on the retail lender. Again, the lenders now
24 have stipulated this is not an uncommon
25 deadline. They have actually given us in the

1 area of 40 days or 45 days to get the final
2 order on the debt. So that is a very
3 standard motion.

4 Again, Your Honor, as we go through
5 the cash flows, the other requirement that
6 you will see is we think we have sufficient
7 liquidity, which was a hotly negotiated
8 issue, to make it through Black Friday back
9 through January, but there is a January 7th
10 requirement that we obtain 75 million dollars
11 in term loan debt, essentially a second lien
12 facility to give us additional liquidity. As
13 I see the case, Your Honor, we have a 60 day
14 period, another 60 day period, and then we
15 can maybe get to Christmas. That's really
16 what we are looking for. So if you think of
17 it this way, go through the Christmas period
18 to January through electronic retailers and
19 then you have to go through Super Bowl. So
20 you have to get liquidity again, buy the
21 goods to get through the Super Bowl, which is
22 February 1st this year, to get us to March.
23 We think that whether we to do this -- and it
24 will be a topic of the motion -- to really
25 get this subfacility with a lender such as

1 the one we mentioned in the first day papers,
2 or another lender, or even a 363 purchaser,
3 is a very likely possibility and we're
4 hopeful. But, again, to get that kind of
5 facility most people will want to see how did
6 you do during Christmas. And so we thought
7 it would be better not to take the first loan
8 that we talked about because it wouldn't have
9 gotten us to that point, but rather, again,
10 with B of A's cooperation managed to secure a
11 period of January 17th so we have what we
12 think is a good 60 day period to do the sort
13 of things we need. Your Honor, then the
14 dates sort of fall in line because it will
15 need to file a plan disclosure statement by
16 March 1st. That's right within that four
17 month time period I'm talking about. Indeed
18 we think that it is not just that you file on
19 but we will actually have to come into the
20 court and be prepared to confirm a plan
21 somewhere in that March 1st, March 15th
22 period because when we resume the leases the
23 leases will have to be assumed or effective
24 or otherwise we face the next date which is
25 March 15th which is the lease reserve date.

1 And what that essentially says is if you
2 haven't come up with an exit for this
3 bankruptcy case, then they are going to force
4 us again to protect their collateral as their
5 right to do, to send out informational
6 packages, to liquidating it, to come up with
7 a 363. It's a bridge to somewhere. That's
8 how I see the case, a four month bridge to
9 somewhere. Again, the last day on the
10 calendar is simply Your Honor grants us that
11 extension of the 90 days, then the date would
12 actually run out on June 10th, and that's why
13 three months later we need to get the leases
14 determined.

15 Your Honor, moving off the calendar
16 -- again, to see this case I think is to see
17 it as two bridges. The first bridge is to
18 give us enough time to solicit interest
19 either from third parties or from the vendor
20 community. The second thing, in July to
21 hopefully come back to this Court with either
22 a vendor supported plan, a vendor supported
23 financing, which we have been starting
24 negotiations with, or a subdebt facility from
25 some other party or a subdebt facility from a

1 potential purchaser that will allow us to
2 exit in the March time frame. That is the
3 company's hope and goal for these cases.

4 Your Honor, moving then to the first
5 day papers, I think we will just go in the
6 order. What I have done is I -- hopefully
7 this will be helpful to the Court and people
8 in the courtroom. I handed out a one-page
9 budget which I'm often teased about, but we
10 hand out a one-page budget which will
11 hopefully show the first 13 weeks of the case
12 and will match up to the relief requested.
13 If you think the print is small now it gets
14 even smaller as I get longer in the case and
15 then we will put it on two pages, but most
16 people complain I can read small but I can
17 read you very well. So it is easy for me to
18 read the small print. Your Honor, just to
19 give you a sense of this budget, we start on
20 the week one and we said here -- we have said
21 here we have broken it down essentially to
22 mere operating expenses or cash flows which
23 is an item two. The first item is a
24 significant one, Your Honor. It is an
25 assumption about how this market is going to

1 operate and comp store sales. Notice it is a
2 scary number. It is off 35 percent. It is
3 off 30 percent. It is off 25 percent. It is
4 off 20 percent. So we think we have taken a
5 conservative assumption, but no one can
6 predict in this market and what people are
7 saying about retail that even a negative 35,
8 30, 25 is conservative enough. And with a
9 company this size there can be significant
10 variation. But that is the assumption about
11 our performance over this 13 week period.
12 Importantly and not in here, Your Honor, is
13 through the week of January 3rd we assumed
14 absolutely no trade credit, CIA. It is our
15 experience and hope to be able to negotiate
16 trade credit and then beginning on the week,
17 I think, of January 10th very little trade
18 credit comes in because we hopefully will be
19 in the negotiating phase and getting some
20 trade credit.

21 The next -- in the cash flows then
22 we have what I call the bankruptcy payments,
23 and, Your Honor, those titles should seem
24 familiar to the first day papers as we either
25 -- each tagged to the amount of relief that

1 we sought in certain of our first day papers
2 by way of any number of arguments, these
3 doctrine of necessity secured claims,
4 whatever, but they are broken down into
5 customer practices, freighter shipping,
6 insurance, mechanic's liens, foreign vendors,
7 and then my favorite, the other one. And we
8 will talk a little bit about the other, my
9 pledge factor.

10 Your Honor, what I think is striking
11 is the next column. It is a column that says
12 how much is this DIP facility going to cost
13 us, all in when you pay the professionals
14 that negotiated it, when you pay the banks
15 the fees and when you pay the lenders'
16 counsel its fees, we have listed here 34
17 million dollars. Your Honor, it is actually
18 probably two or three million dollars less,
19 not more. So we're better. We did put in
20 the number. We've done the calculations. It
21 is probably closer to 30 million dollars over
22 all. So as I said to my board, we said -- I
23 want the Court to understand and I want you
24 to understand we're paying 30 million dollars
25 with 50 million dollars of additional

1 availability over this period of time. Now
2 that's an oversimplification, but I think it
3 is a stark point that Your Honor has to hear.
4 Now we can give you all the other reasons why
5 we're getting covenant relief, we're doing
6 these things and that thing, but at the end
7 of day we are putting in basic economics.
8 You say I want to put 30 million dollars to
9 get 50 to buy the bridge to an exit. We
10 think it is all worth it because our
11 alternatives are not, and, as the experts
12 will testify by proffer or directly, there
13 was no other option but to take this or
14 liquidate, and liquidation was not good for
15 anyone as we have determined.

16 Your Honor, next to the other budget
17 -- and I point this out because we are not
18 seeking approval of something of this budget,
19 but I do want Your Honor to understand that
20 there are two columns that will talk about --
21 under the other line there is employee
22 termination cost and employee incentive
23 plans. Your Honor, we are not seeking
24 approval for any employee incentive plan
25 today or any employee severance or other

1 costs. The employee motion as we go through
2 it -- we stripped it down fairly
3 significantly to pay the basics. We do
4 believe we have one controversial issue that
5 we pointed out in a revised motion that we
6 will take up today. But other than that we
7 think we have determined it. We are not
8 paying severance right now. We're leaving
9 all of that for the discretion committee to
10 be formed. We are therefore only paying
11 those expenses to be necessary and in all of
12 our motions to avoid immediate and
13 irreparable harm.

14 Then, Your Honor, we can see that
15 the low balance as of today is about 756
16 million dollars. And that's an estimate.
17 Your Honor, the DIP facility here is -- I
18 don't think is unique anymore in the market,
19 but it is one people can question in the
20 following way: we are seeking -- whether you
21 call it a first day role of the entire
22 facility to convert into post petition debt
23 or as you see it as a new facility taking out
24 the old facility, the fact of the matter is
25 if Your Honor approves that facility today,

1 the company will lose bankruptcy rights. It
2 will lose its right to cram down, for
3 example, or cram up the secured lenders. It
4 will lose the right to reinstate those debts.
5 It understands that. It is asking to take
6 the full amount of loan, pay the loan down
7 and then start going forward. The ironic
8 part, Your Honor, and I think the media will
9 pick this up but it's worth the finance,
10 although we are reducing our commitment from
11 1.3 to 1.1 down to 900 eventually, we are
12 actually increasing our availability. That's
13 just the way an ABL loan works. If you don't
14 have enough inventory and goods to get up to
15 that cap, you are never going to borrow the
16 1.3. We don't have that. We are not going
17 to get up to the 1.1 or the 900 as you see
18 through this model. Nonetheless, what we
19 have gotten to an advantage is we're able to
20 use available collateral again through Bank
21 of America the Canadian assets. So we get a
22 better borrowing rate which gets us to
23 greater liquidity which gets us to 50 million
24 which we believe will get us to that January
25 date. Again, we can also think of it simply

1 -- if we jettison all the stores we have
2 jettisoned, you don't need a bigger facility
3 to put in as much inventory. Again, that may
4 be an after thought as to how you describe
5 it. The fact of the matter is we don't have
6 the capacity to borrow that. It is not a bad
7 sign that we are losing our commitments or
8 they are being reduced. It is an economic
9 advantage for lenders and it's one of the
10 quid pro quo for getting this many
11 facilities, but I think the message here is
12 we're getting additional availability.

13 Your Honor, again, at the very
14 bottom of that budget -- I point this out
15 because it becomes a topic of the first day
16 papers -- you will see that we have put in
17 what we call a utility reserve. As the code
18 has changed through 366 there is a, you know,
19 give the money, we come up with what I will
20 say is a somewhat creative way of dealing
21 with it by making an LC landlord and then
22 they can come in and object and we'll
23 resolve, which gets me back to my other
24 budget. Your Honor, we have set the LC
25 reserves as we said in the first day motions

1 by two weeks. And Your Honor knows as
2 practice, most regulatory agencies say you
3 can ask up to two months. Once you are a new
4 debtor, if you have no credit history or if
5 you have a credit history and it is a bad
6 credit history, they ask for a two-month
7 security deposit. The truth lies somewhere
8 between two weeks and two months. Probably
9 that other line frankly, Your Honor, is our
10 ability to negotiate settlements at something
11 between that two weeks and less than -- less
12 than two months, far less than two months,
13 hopefully at two weeks, and that's how we use
14 the other line. So it is not that we have
15 some slush fund to use. It would be part of
16 the authority that we are seeking Your Honor
17 to approve today.

18 Your Honor, I think that goes
19 through the budget. Now, again, I will come
20 back to the DIP, but I can move on to the
21 basic first day papers if Your Honor would
22 like to do so. Your Honor, I heard 24
23 motions. I think I lost count because I have
24 an agenda that's 22. Maybe there is a couple
25 of ad hocs of 24 -- okay. I'm not sure which

1 ones. So if I miss one, let me know where I
2 am.

3 THE COURT: On the Court's calendar
4 there were 23, but we have already taken care
5 of one which was the motion for you to appear
6 pro hac.

7 MR. GALARDI: Well, I'm glad that
8 that one was granted, Your Honor. I think we
9 can move. I didn't have my own appearance
10 on -- I have not yet moved my pro hac vice.
11 Your Honor, the next motion on the agenda is
12 the motion under 105 to set an expedited
13 hearing today. I don't know if Your Honor
14 has approved that.

15 THE COURT: That is approved.

16 MR. GALARDI: Thank you. The next
17 matter, Your Honor, is waiting requirements.
18 It is the joint administration motion.
19 Again, Mr. Besanko has set forth in the
20 affidavit, as Your Honor can see from the
21 corporate structure, each of the entities
22 that filed affiliated in either direct or
23 indirect subsidiary or wholly owned
24 subsidiary. Your Honor, it is not subject to
25 consolidation. It is very clear for

1 procedural purposes. I don't know if Your
2 Honor has questions or need anymore
3 information on that motion.

4 THE COURT: I have read the papers.
5 I don't have any problems with it. It would
6 be quite normal to proceed with it in this
7 fashion.

8 Does any party present want to
9 object to the joint administration? All
10 right. That motion will be granted.

11 MR. GALARDI: Your Honor, the next
12 motion is the motion to approve the
13 application of a claims noticing agent. I
14 don't think Your Honor's Court nor we would
15 want to take on the noticing burden that will
16 be here. We have sought to retain Kurtzman
17 Carson Consultants. They have done many
18 large cases for our firm and many other
19 firms. They are listed in those matters.
20 They do the claims. They do the noticing.
21 They have a website. People can find out the
22 claims. They will do the process of posting
23 our papers, and then ultimately when we come
24 to soliciting acceptance or a rejection of
25 the plan of reorganization they will

1 hopefully serve as balloting agent for this
2 purpose because they will have the claims and
3 classifications. I don't know if Your Honor
4 has questions about that motion.

5 THE COURT: Again, I reviewed the
6 papers. I find them to be in order.

7 Does any party wish to speak in
8 opposition to the motion? That motion will
9 be granted.

10 MR. GALARDI: Your Honor, I'm now on
11 number five, I believe, on my agenda. It is
12 the motion for the debtors to set various
13 notice of case management and administrative
14 procedures. Your Honor, it is what I
15 understand to be a fairly standard motion in
16 this jurisdiction. I think the only thing
17 that would need to be filled in, and maybe we
18 can come back to this at a certain point, is
19 dates for omnibus hearings would be set. I
20 gave in part the calendar to sort of talk
21 through that. I don't know if Your Honor's
22 preference is whether to try to set those now
23 or wait and come back to that at the end of
24 the hearing. I think there is nothing else
25 that's controversial in that motion. Unless

1 Your Honor has questions, I would ask to be
2 granted.

3 THE COURT: Any parties want to
4 speak in opposition of the motion? It will
5 be granted.

6 Why don't we come back at the end of
7 the hearing and set the dates because of some
8 of the other motions we'll need to take into
9 consideration when we set those dates.

10 MR. GALARDI: Thank you, Your Honor.
11 Your Honor, the next motion is the debtor's
12 motion. Again, these are administrative
13 motions whereby they want to prepare a list
14 of creditors and we will submit a formatting
15 or mailing matrix, file a consolidated list.
16 As the debtors we filed the 50 largest
17 creditors. Again, KCC is in their matrix and
18 sending the notices. I think it is fairly
19 standard. We prepared the top list, and we
20 will be filing schedules and statements
21 against, again, with our aggressive schedules
22 with plans and disclosure statement and then
23 we set bar dates. We will be doing that as
24 fast as we possibly can. We ask Your Honor
25 to grant our motion number six.

1 THE COURT: That motion will be
2 granted.

3 MR. GALARDI: Your Honor, moving
4 down to number seven -- and I will now say
5 I'm into what I'll call the business
6 operation motions. Again, I think I sort of
7 see these as going from administrative down
8 to business operations, from fundamental to a
9 little bit more controversial depending upon
10 what jurisdiction you're in. Your Honor, the
11 next motion is motion number seven. It
12 really seeks four forms of relief. One is to
13 authorize the company to continue using its
14 existing bank accounts; two, is to use
15 existing business forms, although it is hard
16 to say in this internet age how much you
17 actually have to check in the non-debtor
18 possession but I'm sure we have some. So I
19 think we sought to continue to use the stock.
20 More importantly and the most important is it
21 is actually required by the DIP which is to
22 continue our cash management system in that
23 payment, the checks and balance. We have a
24 very complicated graph of disbursements. But
25 essentially, Your Honor, all the money comes

1 in and goes out to Bank of America and it's
2 re-lent all in the same day and goes out to
3 the disbursement accounts. We have a number
4 of separate disbursement accounts which will
5 pay down the loan we borrowed again for the
6 most part under this facility. Again, it is
7 automated, electronic. The company, for
8 example, can tell me one day or two days
9 later, well, how are the sales going in those
10 GOB stores. At the store's closing they can
11 tell me the sales are up 200 percent. It
12 would be very difficult for Mr. Besanko
13 himself to try and change that. In addition,
14 Your Honor, we have an intercompany that we
15 would like to be able to pay some money out
16 of the debtors estate and the banks have
17 agreed to this to a Hong Kong facility
18 intercompany. That is a servicing agent. It
19 helps us to get contracts with our foreign
20 vendors abroad that don't have -- that are
21 not in this jurisdiction for doing business.
22 It is a small amount of money. It is
23 essentially to payroll for those people
24 working there. Again, the banks have
25 consented to that. It is money that goes out

1 of the system. We would ask Your Honor -- if
2 Your Honor has questions about it, I don't
3 think I can to tell you every bank account or
4 every disbursement account, Your Honor, but I
5 can tell you Mr. Besanko has control over
6 those funds, understands where the funds
7 flow. If we were in the treasury department,
8 we would have to face substantial
9 difficulties if we were actually to try to
10 belie closing accounts, opening accounts and
11 different accounts. It would also be a
12 default under our DIP document and they are
13 comfortable in our system. I don't know if
14 Your Honor has any questions about that.

15 THE COURT: Any party wish to speak
16 in opposition to this motion?

17 The Court did have one question with
18 regards to the order that you sent us.
19 Apparently what I would see as a
20 typographical error as it appears on Page 6
21 at the bottom, paragraph nine is not finished
22 in the form order that was submitted to the
23 Court.

24 MR. GALARDI: I think we submitted a
25 revised one for exactly that reason. We

1 noticed that this morning. What we can do is
2 get you a copy of a new order and obviously
3 Your Honor can review it, and if it meets
4 Your Honor's approval we can submit that.

5 THE COURT: Thank you. With that
6 change, that's approved.

7 MR. GALARDI: Your Honor, the next
8 motion is a motion for interim and final
9 orders of waiving of the investment and
10 deposit requirements. Again, the Bankruptcy
11 Code under Section 345 makes sure that we put
12 our investments in safe investments. We --
13 ordinarily because we think that the banks
14 are safe and generally in this instance
15 because it is a very much revolving line,
16 it's actually -- as I was talking with the
17 U.S. Trustee -- don't believe it is really
18 our money. It goes down and we borrow it.
19 So it's really in their possession.
20 Nonetheless, as the U.S. Trustee pointed out,
21 Bank of America, Wachovia, I believe, were
22 already collateralized companies. So to the
23 extent we're going to get any relief on the
24 interim relief we will -- we do in turn have
25 to let the U.S. Trustee know about the bank

1 accounts. It is without prejudice for them
2 to get comfortable that either they need
3 these collateralization agreements or they
4 don't, but I think on an interim basis they
5 are content, and we'd ask for Your Honor to
6 waive them on an interim basis and come back
7 on a final hearing if someone should, in
8 fact, object to our continuing to be free
9 from the burden of 345.

10 THE COURT: Anybody wish to be heard
11 on this motion? Okay. That will be granted
12 on an interim basis. That would be one of
13 the hearings, I assume, you will need to set
14 as part of an ongoing series?

15 MR. GALARDI: Yes, Your Honor. As
16 we now get into that, that's a perfect
17 introduction to the next set of motions.
18 Again, it is my understanding and generally
19 my practice, Your Honor, that notwithstanding
20 the fact that I haven't styled the rest of
21 these first day motions where I have what I
22 will call the bankruptcy payments, that
23 notice being what it is is not absolutely
24 perfect on one day. So -- and we have tried
25 to reach out to people we think would be on

1 the committee. My understanding is there
2 would be pretty much interim relief and we
3 would probably talk with the U.S. Trustee
4 again in the spirit of irreparable damage or
5 harm notwithstanding the fact we are getting
6 relief. What I would suggest with respect to
7 relief -- and we will talk about each one.
8 There is only one thing when it comes to the
9 employee one that I would like that to be
10 interim. Otherwise with respect to the
11 motions, my understanding is it would be
12 interim, it would change the orders out, it
13 will send what I call a negative notice
14 deadline. If you object, we'll come back to
15 the first omnibus hearing. And if you don't
16 object, it automatically goes final.

17 THE COURT: That would be the
18 Court's preference.

19 MR. GALARDI: Okay. That will work
20 because our budget, again, Your Honor,
21 assumes the number of payments. Obviously we
22 are not going to push all the money out
23 because I know Your Honor has read this -- we
24 are authorized but not directed to make all
25 of these payments. So just because it is on

1 the budget we have a disbursement covenant.
2 We want to make sure we satisfy that. There
3 is not one's entitlement to any of this
4 money. We will be negotiating as best we
5 can, but I think it is a good way to have us
6 come back to the Court again and put more
7 fine print on it where we stood actually if
8 someone wants to object to where the
9 committee comes and says I don't think you
10 should be making these payments which will
11 not prejudice their right on a subsequent
12 hearing. So with that said we can make the
13 orders all have the kind of language that I
14 said, the negative notice, and we'll talk
15 about a date for objection and at the hearing
16 if there is an objection we will come back.
17 I think that makes the U.S. Trustee more
18 comfortable, and I assume it makes the Court
19 more comfortable.

20 THE COURT: It does.

21 MR. GALARDI: Your Honor, with
22 respect to the employee motion, I think that
23 a few things that want to -- one, I think it
24 is a fairly standard motion with maybe two
25 caveats. First, with respect to the

1 employees we seek to pay wages, salary and
2 the ordinary health benefits. Your Honor,
3 there is no one in this group that -- and our
4 last payroll, I believe, went out -- it was
5 either October 29th or 30th, and so, Your
6 Honor, we are actually coming up on -- the
7 next payroll would be next Wednesday. This
8 Wednesday we will fund. There are no
9 employees to our extent if you take the
10 strict wage and salaries that are over the
11 10,950. So we are asking the approval of
12 that. With respect to -- now if Your Honor
13 takes also benefits, we have asked for a
14 number of things which we think would be a
15 hardship if Your Honor does not approve. In
16 particular we have employees that are
17 relocating. So we have asked for relocation
18 expenses. We have asked for business
19 expenses. If they didn't get in their Imex
20 bill on time, it is a hardship to burden them
21 with that. We are asking Your Honor to be
22 able to reimburse them. We are asking Your
23 Honor to reimburse -- we have the position --
24 their health cost, those, Your Honor, are
25 fairly straight forward relief that we have

1 obtained in many courts. Let me say the
2 hardships that we have put the employees on
3 -- we have terminated with respect to
4 retirees programs. We are not making
5 payments to retirees given the financial
6 budget that we have. It is just an
7 unfortunate fact between paying retirees
8 additional benefits versus having money to
9 run the operation, which I have described as
10 a 60 and not 120 day case. We've decided to
11 terminate certain of those funds. In
12 addition, Your Honor, we are seeking again
13 for employment moral issues to continue the
14 401(k) match for the time being, the
15 company's share of the 401(k) match. What we
16 have stopped, Your Honor, and what we are
17 going to encourage employees to make a
18 decision about, we have a supplemental 401(k)
19 program. The company has a match to that
20 supplemental 401(k) program and the employees
21 have to opt for tax benefits at the beginning
22 of the year to continue to make those so they
23 get tax benefits. Unfortunately, Your Honor,
24 that's a funded plan that's in a Rabbi trust.
25 I'm not sure if Your Honor understands that

1 that's subject to the claim of general
2 creditors. So at the very least the company
3 decided we will terminate -- we can do this
4 fix -- terminate our contribution to that
5 supplemental 401(k) as soon as possible,
6 meaning today. With respect to the
7 employees, unfortunately -- and we've tried
8 to figure out how to stop them from making
9 those contributions. We have decided to let
10 them have that election to do that. However,
11 that could have tax implications if they do
12 so. So they will have to pick between paying
13 money into a trust that will be subject to
14 the claims of unsecured creditors or taking
15 the tax implications. We tried to explain
16 that to people but that was the best we can
17 do under the plan, and so we have asked for
18 authority and the board approved last night
19 to give them that option. But what we also
20 did, Your Honor, is we're not allowing them
21 to make an election for 2009. That, we could
22 do. So that will stop in 2009. It is just
23 an unfortunate fact that you can't stop for
24 the employees the contribution, but we will
25 try to get them and tell them to advise their

1 tax advisor. That was one thing we
2 terminated. We also terminated, Your
3 Honor -- and this we can do -- is we
4 terminated the company's stock purchase plan
5 which the employees can do as a regular
6 payroll. So instead -- and they elected to
7 do this -- and, again, Your Honor, we are in
8 a public company. So we can't simply say,
9 before we filed, stop this, we have
10 information. So we have done that because we
11 don't -- unless the employee wants to go out
12 in the market and buy the stock we think it
13 is time to terminate that and not any longer
14 have that. We have information that they
15 don't have it and we don't want to have them
16 deduct for payroll for future stock
17 purchases. So we have terminated that. Your
18 Honor, there is a list of programs that we
19 have also changed. It is histrionically the
20 case that the company has got -- the
21 employees got paid time off, and if they left
22 and they had paid time off, they would get
23 that payment. We have changed the program
24 such that if you leave the company you do not
25 get a cash payment for the paid time off.

1 Again, it is an unfortunate fact, but given
2 our liquidity situation we have decided to do
3 that. That said, those people will still be
4 able in the ordinary course of business to
5 use their paid time off as if we had not
6 filed Chapter 11. So if they have vacation
7 time, and subject to the needs of the
8 company, and they can take that time off,
9 they can use it and be paid for that paid
10 time off in the ordinary course. And the
11 difference between paid time off and vacation
12 is it just covers -- whether you have a
13 family day or vacation day or sick day we
14 don't ask the reason. We give you a certain
15 amount of paid time off. Employees are still
16 allowed to do that. Again, you just can't
17 take the next month off. Obviously it is
18 subject to the needs of the company. Your
19 Honor, we have a severance plan which we have
20 made no determination, but obviously, Your
21 Honor, under the circumstances it would be
22 difficult for us to get approval ultimately
23 on a severance plan, but, again, I have put
24 money in the budget to talk about what we are
25 going to do. It is a committee issue, not a

1 today issue. So we have essentially punted a
2 number of what I will call the other benefits
3 for another date to come back without -- we
4 reserve all rights to come back to the Court
5 to ask for that.

6 That then brings us to probably the
7 most unfortunate, controversial part of that
8 motion. As I mentioned in my opening
9 statement, Your Honor, on Thursday and Friday
10 we terminated nearly 700 employees at the
11 corporate level. Since it is a one location,
12 Your Honor, we gave them a 60 days Warn Act
13 notice. The Warn Act says you have to give
14 notice and essentially your termination is
15 effective 60 days before or you would have to
16 pay the person back wages if you didn't get
17 the notice. Again, we gave the notice saying
18 you would be terminated 60 days hence.
19 Notwithstanding that fact, Your Honor, there
20 are two cases which we cited in our amended
21 motion that have taken under BAPCPA the case
22 that says -- well, under BAPCPA you're going
23 to have to still show administrative expenses
24 under 503(b)1, and clearly we have laid off
25 these employees. We have no intention at the

1 present time to recall them just to work. It
2 is a head count reduction. So I can't stand
3 before Your Honor and say we are going to get
4 a post petition benefit from those people in
5 particular. The payroll that that accounts
6 for is roughly 1.1 or 1.2 million dollars a
7 week. Your Honor, based upon just general
8 -- the mood at the company, the employee
9 moral, the need in the community, the company
10 determined after seeing that it had in fact
11 this option, that we would still like to pay
12 the payroll to those people for the next
13 eight weeks. That said, Your Honor, as I
14 described to the U.S. Trustee in that -- and
15 one of the reasons that we think it is
16 interim relief is we understand that there
17 could be -- we're not going to be -- we will
18 be supporting the employees to get them their
19 wages. We don't have a severance plan as I
20 mentioned. We sort of suspended it. At the
21 very least, Your Honor, in thinking about it
22 what we have decided to do is ask Your Honor
23 to have the relief to continue next week the
24 payroll. It would be one thing to send them
25 home Thursday and Friday telling them you

1 have a paycheck coming and, oh, by the way,
2 we filed on Monday morning and now you have
3 no paycheck. I think that would be
4 devastating to the community and devastating
5 to the morale of the company. And after
6 talking -- and again Mr. Besanko can testify
7 to this -- we have asked for authority to
8 continue the payroll. That payroll number is
9 in our payroll numbers in the DIP budget. It
10 is in every form of DIP budget that -- we
11 haven't highlighted it as a separate line
12 item but up in the operating expenses the
13 payroll is there for the benefit of those
14 people who have always been there. We
15 happened to find a case that came out two and
16 a half weeks ago that says we didn't have to
17 do this, and, again, we have been working
18 very hard with the employees to make sure
19 this is a smooth landing. Indeed they were
20 very encouraged, notwithstanding being laid
21 off, and frankly very positive about the
22 company and the steps the company took. So
23 we just couldn't see a good reason other than
24 saving money, but it is a significant amount
25 of money, other than to pay them. So with

1 that we would ask Your Honor, again, on this
2 one part of the relief, that Your Honor
3 approve that we continue to pay the payroll,
4 but, again, it could be visited by the
5 committee two, three weeks from now and if
6 the committee wants to object to it, we will
7 defend it and they will be the person
8 objecting to so we can do the payroll.

9 THE COURT: That would be
10 retroactive relief. That would be continuing
11 it out through the Warn Act period?

12 MR. GALARDI: Correct, Your Honor.
13 Again, our view would be, you know, see it as
14 a two week notice sort of provision. That's
15 the worst it would be if they got cut off.
16 Again, the company feels strongly that we
17 should have the eight weeks and it should be
18 a moral issue. Again, to put it in further
19 context we have the store closings. We are
20 giving people warn notice there. They just
21 happened -- they got the notice prebankruptcy
22 but they are still working post bankruptcy.
23 So they are going to get the 60 days in any
24 event because the case doesn't really apply.
25 They have provided a benefit and the

1 termination does not. So there will be
2 disparate treatment of our employees. So
3 just because we could not have them not
4 operate the store, it all seems unfair to us
5 do that. So, again, the company felt very
6 strongly, and Mr. Besanko is in the
7 courtroom, could talk about the employee
8 moral in those matters, but we have sought
9 that relief. Again, at the very least we
10 would like to come back on an interim basis
11 and let the committee look at it. We didn't
12 think it was fair to ask for the full relief
13 but the company's intention is to pursue the
14 entire eight weeks.

15 THE COURT: All right. Very good.
16 Does any party wish to speak in opposition to
17 this motion? All right. The motion will be
18 granted and the Court will -- with the
19 proviso that the terminated 700 employees --
20 that would be on an interim basis to give the
21 community an opportunity to come in and
22 object if they wish to do so.

23 MR. GALARDI: Your Honor, what I
24 think we will do is we will do an employee
25 order and make it specific. I think we call

1 them the warned employees in our motion. So
2 we will say interim relief with respect to
3 the Warn Act and you will have X period of
4 time to object to that and we will come back
5 and set a hearing. I don't want the rest of
6 the employees stuff to be seen. Again, they
7 have --

8 THE COURT: I understand exactly
9 what you are saying. That will be -- that's
10 not interim relief. That is -- it will be
11 approved today.

12 MR. GALARDI: Thank you, Your Honor.
13 Your Honor, the next matter is a fairly
14 standard motion to pay prepetition sales use
15 and trust fund taxes. Again, there are
16 disputes as to whether these are priority
17 claims, whether secured claims, whether they
18 are even property of the estate. The U.S.
19 Trustee's Office wants us to pay our taxes.
20 Most people want us to pay our taxes. We
21 don't want to incur any interest or other
22 payments on it. Again, a lot of it is not
23 even property of the estate. We seek the
24 relief, Your Honor. It is basically up in
25 our standard operating expenses. It is more

1 of an accident of timing than it is that we
2 have not paid these things at any given time.
3 It would be hard to decipher what is pre and
4 post, and we would ask Your Honor to approve
5 our continuation of plain sales, use and
6 trust fund taxes. Again, there are often
7 personal liabilities associated with failure
8 to pay them. If you don't pay them, there is
9 also an administrative issue at the end of
10 the case if you've left them out for such a
11 long period of time. We rather not face
12 those issues. They are secured. They are
13 priority. So we would ask Your Honor to
14 approve the sales use and pay trust fund
15 taxes.

16 THE COURT: That motion will be
17 granted.

18 MR. GALARDI: Your Honor, we now get
19 to my procedural motion that is with respect
20 to Section 366. Your Honor, as I described
21 at the outset the company obviously has 700
22 and some stores. We are seeking relief with
23 respect to the utilities. Under Section 366
24 as amended the process is essentially that
25 the debtors have to make a proposal within a

1 certain period of time. I believe it is 20
2 days. Then what a utility can do is say is,
3 no, I don't like that proposal, and then you
4 have to give the utility -- if you haven't
5 resolved that issue on the 30th day, you have
6 to give the utility what it requests. To
7 take account of that and not have all the
8 money go out the door and have to pull it
9 back and have all of those fights, what we
10 have to devise is a motion which has been
11 approved in number of jurisdiction whereby we
12 set up first day and we say here's what we
13 are prepared to give the utilities. We are
14 prepared to give the utilities the right to a
15 blocked account at the Bank of America that
16 is a separate, segregated fund of 5 million
17 dollars. We give them a form very much
18 styled in a letter of credit form that says
19 we say you're in default. We draw the
20 amount. Bank of America, just like an LC,
21 has to not inquire whatsoever. Whether
22 there's a default or there is not, it pays
23 it. We then, like a wrongful draw on an LC,
24 we would go back and say now that was wrong
25 but then our dispute is with the utility if

1 they make that wrongful draw. We think that
2 amount of fund, two weeks for all of the
3 utilities at 5 million dollars, is
4 significant. So we think we have given them
5 adequate protection. It is the other
6 security element of 366. Notwithstanding
7 that, Your Honor, they don't have to accept
8 it and that's what 366 says. So what we try
9 to do is to say, okay, if you don't have to
10 accept it, we need you to come in and tell us
11 what form of your security we would like. We
12 set a deadline to do so and we ask Your Honor
13 to have a hearing before that 30th day so
14 that we can resolve it. Again, money doesn't
15 go out the door only to come back in because,
16 Your Honor, if that's two weeks and you
17 really need two months, you are talking 20
18 million dollars and that puts this case into
19 no availability in the first weeks. Also,
20 Your Honor, we have 155 stores and we have to
21 pay utilities to all of them and we have to
22 be out of them by the end of December. We've
23 paid them in advance for all of those months
24 and then we have to come back. So we'd like
25 to deal with that one on one. We don't think

1 that this prejudices the utilities because
2 they still have all of the state law rights
3 and they can still ask for two months, and,
4 Your Honor, it sounds like we'll have
5 thousands and thousands of utilities here on
6 the 29th. Generally speaking we have
7 resolved all of these with respect to
8 stipulations. We seek the authority to do
9 that. And as I said, Your Honor, in all
10 candor we have an other line which where we
11 do exactly that and we can negotiate. We
12 want to keep it to two weeks. We may in
13 certain instances do more. We may in certain
14 instances try to do less if we find out, but
15 we don't need to give utility deposits or if
16 we could use old security deposits in the
17 close of stores. So we would like to have
18 the authority to implement that procedure
19 without prejudice to the utility companies
20 coming in and acting on their rights. I can
21 give you what they will say in response to
22 this. They will say never got a receipt.
23 And we'll have those arguments but we
24 generally have resolved it, and I think it is
25 generally a procedural motion to get us

1 through 29 days from now.

2 THE COURT: Does any party wish to
3 speak in opposition to this motion? Mr.
4 Johnson.

5 MR. JOHNSON: Your Honor, Russell
6 Johnson here on behalf of Virginia Power and
7 several Virginia entities, Duke Energy,
8 several energies, Progress Energy,
9 Consolidated Energy Company of New York, and
10 several northeast utility companies. Our --
11 I don't disagree that the debtors need
12 procedures here. It is a big case and a lot
13 of utilities. Essentially a few arguments.
14 One a legal argument and one procedural.
15 With respect to the motion to the procedural
16 objection I have, Your Honor, is that I think
17 there should be an objection deadline. This
18 procedural -- we make a request, they get to
19 look at it and decide whether or not it is
20 okay, and then three days before the hearing
21 they'll let us know whether or not it is okay
22 and then there will be a hearing. I just
23 don't think that is really what's proper. I
24 think we should be able to object to this
25 motion to procedures that are set forth and

1 still be heard before the 30th day. I think
2 if we're going to have a hearing before the
3 30th day I think that's fine. I don't have a
4 problem with them seeking these procedures
5 but I think my client should have the right
6 to object to them. There is nothing in this.
7 This is a final order that basically says
8 these are the procedures, you have filed
9 them, and for some unfortunate utilities that
10 don't get this notice or get it too late they
11 will be forever barred from seeking adequate
12 assurance. I think that's improper as well.
13 I'm only representing my client that are
14 actually here. So, Your Honor, I would
15 request that there be some deadline, maybe 10
16 days before the hearing date, that we can
17 object to these procedures. I haven't had a
18 chance to read through the whole thing. I
19 tried to digest as quickly as I can to get a
20 lot of the notice of this hearing this
21 morning. So that's the first issue.

22 The legal issue, Your Honor, is
23 essentially the debtors are here under
24 Section 363(c)3. They are under the
25 provision that says they can modify the

1 adequate assurance of the utilities as deemed
2 satisfactory under (c)2. That's fine.
3 That's what they are here for. If you go
4 back to (c)2, my client -- we don't want a
5 segregated deposit fund. That's not what we
6 would choose as the form of adequate
7 assurance. My clients would want a cash
8 deposit as the form. So we don't think that
9 the debtors have the ability to modify the
10 form. My clients would be asking for cash
11 deposit, and all the 366(c)3 allows them to
12 modify is the amount. It says very
13 specifically in there that they can modify
14 the amount of the (c)2 deposit. It does not
15 allow them to modify the form. So my clients
16 would be fine accepting a two week or 15 day,
17 whatever it is that they are proposing, cash
18 deposit to tide this over until the matter is
19 heard, whatever the 29th or 30th day is
20 whenever the Court can schedule a final
21 hearing. We don't want this segregated
22 account which may or may not be there at some
23 day in the future. They even put it in their
24 motion whether or not they are going to be
25 able to fund this thing. So we want the

1 actual cash to tide us over because that is
2 the type of adequate assurance we would
3 request.

4 THE COURT: Let me see if I
5 understand. We are still dealing with 366(b)
6 thought, right? All 366(c) is doing is
7 defining some of the terms for purposes of
8 figuring out what's adequate assurance
9 payment under 366(b).

10 MR. JOHNSON: No. A chapter 11 case
11 like this it is really all 366(c).

12 THE COURT: I understand the
13 procedures in 366(c). Didn't we have the
14 same liquidity in the Rowe case.

15 MR. JOHNSON: Well, Rowe was a cash
16 deposit.

17 THE COURT: I understand. What you
18 are objecting to is that it shouldn't be a
19 draw for the most part on the letter of
20 credit.

21 MR. JOHNSON: It would be better if
22 there's a letter of credit than a segregated
23 bank account.

24 THE COURT: That's the way it is set
25 up for block account so the reserve is there

1 under the --

2 MR. JOHNSON: Well, they still have
3 financing. If they lose financing, the
4 segregated account presumably would be gone
5 as well. There is nothing said about that,
6 but I have to assume -- if they lost
7 financing or have a reduction in financing,
8 what will happen to that segregated account?
9 That has not been made clear in the motion.
10 That's why we would prefer to have cash until
11 this matter is heard on the 29th or 30th,
12 whatever day the Court schedules for this.

13 THE COURT: All right. And tell me,
14 as I'm a little bit unsure about your first
15 objection to the procedures, what is it
16 procedurally that you want to object to? You
17 don't like the fact that they are making the
18 offer and you have to then have a
19 counteroffer or do you want to object to them
20 being able to establish a procedure on first
21 day motion?

22 MR. JOHNSON: The objection would be
23 to the entire motion which would be, one,
24 that a segregated account can't be the proper
25 form of adequate assurance. It's got to be

1 cash. That would be the first thing we would
2 like to object to, which we all have the
3 opportunity. This is the final order on the
4 first day of the case that they are proposing
5 that then sets -- requests the utilities have
6 to send these requests to all of these
7 various folks that have all of these things
8 in it. We would send requests for charts and
9 account information with things like that
10 anyway. I think this goes over the top of
11 all the stuff they are asking in there, but
12 then they can get a period of time where they
13 have to look at it. Because we have five
14 days before this determination, five business
15 days prior, and then three business days
16 prior they have to respond to us letting us
17 know whether or not they agree with our
18 adequate assurance requests and then the
19 matter gets heard. That seems like a pretty
20 crazy timetable. We would like to have an
21 objection out there and have this Court hear
22 our objection on all of these procedures and
23 not have to wait and give them some request
24 and if we don't give them the request by the
25 proper time and deemed to have waived it. I

1 just don't think that we should have to fit
2 into that whole thing and comply with their
3 procedures which aren't even set forth in the
4 statute. The statute doesn't provide for
5 these procedures. The statute says we make a
6 request or they can, you know, make a request
7 but -- and they can move to modify. That's
8 all the statute provides. And I don't have a
9 problem, as I said, with this matter being
10 heard before the 30th day, but I certainly
11 want it to be heard before the 30th day with
12 a final hearing on what their Section 366(c)3
13 motion seeking to modify our request would
14 be. I think this throws the whole thing out.
15 If we make a request, we're -- what pleading
16 do we have before the Court? We don't have
17 any pleading before the Court at all. We
18 have a request that we sent to them and then
19 we will be back before this Court if we don't
20 agree on the request that we sent. We have
21 no pleas, we have nothing before the Court at
22 all under these procedures. The final order
23 is being entered, we get to send some
24 request, and then there is a hearing.

25 THE COURT: All right. Thank you.

1 MR. GALARDI: Your Honor, two
2 responses. First, I have no problem if
3 everyone of Mr. Johnson's clients are carved
4 out from this motion, and the reason I have
5 no problem is that I don't need a procedure
6 for them because the Bankruptcy Code -- all
7 we're trying to do is actually jump the gun
8 for the Bankruptcy Code because you start
9 with (b), and what (b) says is that a utility
10 can terminate service or discontinue if
11 within 20 days after the day of order of
12 relief we don't furnish adequate assurance of
13 payment in the form of a deposit or other
14 security. We're not 20 days now. I don't
15 need this procedure. I'm trying to jump the
16 gun to give people something. So if every
17 one of his clients wants to step out of this
18 procedure, I will write an order today that
19 Mr. Johnson's clients don't have to comply.
20 He doesn't want that. He wants his money
21 now. The problem with that is the code
22 doesn't say he gets his money now. What it
23 says is if after 20 days I make an offer of
24 form of security -- and we're basically
25 saying we're making an offer and here it is

1 two weeks. 6(i) in (c)1(a) says other forms
2 of security that's mutually agreeable. We
3 know Mr. Johnson. I know him from good
4 cases. He's not going to find it acceptable.
5 So what does the Bankruptcy Code say? Well,
6 in that instance you either get to an
7 agreement, now we're in (c)2, in 30 days or
8 they can terminate. Fine. Then what we do
9 is after the 30 days is a (c)3 when we come
10 back. What we're trying to get here is
11 before the 30 days so we can't terminate. So
12 I have two solutions. One, let's just carve
13 him out. A procedural objection is therefore
14 relevant. He wants to take an appeal on this
15 kind of order. He's always wanted to do
16 that. So let's carve him out, he's not
17 applicable, and he can make an offer
18 individually and he can accept it or not.
19 And as long as we agree, and I think he stood
20 up here and said 29 days is fine, let's just
21 schedule a hearing on his request for day 29
22 and he's carved that out of the motion and
23 that objection is resolved.

24 THE COURT: Mr. Johnson, does that
25 resolve your objection?

1 MR. JOHNSON: Yes. I love the extra
2 commentary, Judge. But, yes. So carve us
3 out here on the 29th day of whatever schedule
4 you have is fine.

5 THE COURT: To make sure you stay,
6 we're going to schedule those dates at the
7 conclusion of this hearing.

8 MR. JOHNSON: I'm here for another
9 client as well.

10 MR. GALARDI: Can I just ask that he
11 put the name of his clients on the record.

12 MR. JOHNSON: Yes. Progress Energy
13 in Florida, Progress Energy in Carolina,
14 Dominion Virginia Power, Dominion East Ohio,
15 Dominion North Carolina Power, Dominion
16 Peoples, Dominion Hope, the Consolidated
17 Edison Company of New York, Yankee Gas
18 Services Company, Public Services of New
19 Hampshire, Connecticut Light and Power,
20 Western Massachusetts Electric, Duke Energy
21 Carolinas, Duke Energy Kentucky, Duke Energy
22 Indiana and Duke Energy Ohio. I think that's
23 all.

24 THE COURT: Thank you, sir.

25 MR. GALARDI: And with respect to

1 that, Your Honor, at the same time I think
2 our order provides that once he's carved out
3 then we can reduce the 5 million dollars by
4 two weeks for each of those utilities so the
5 five million will come down and there will be
6 no reserve for any of those clients.

7 THE COURT: That's how I understand
8 it to work as well. The motion with that
9 adjustment will be approved.

10 MR. GALARDI: Thank you, Your Honor.
11 Your Honor, the next matter -- and I'm glad
12 he's in Virginia and we can do that the first
13 day instead of coming back for a hearing.
14 Number 12, Your Honor, is the next motion up.
15 It is debtors' motion for an order
16 authorizing the continuation of certain
17 customer practices. Your Honor, most of the
18 obligations that we have are not cash
19 obligations. There's the gift cards.
20 There's the warranties. So there is no
21 number in our budget for that, but obviously
22 we could technically under the Bankruptcy
23 Code say today, sorry you have your gift card
24 and you can't collect. You come buy goods
25 with it. You're not going to get a refund.

1 You're not going to get a warranty.
2 Obviously we're trying to reorganize. Maybe
3 if we were liquidating the first day, that
4 would be the smartest relief. In order to
5 make -- as I said in the introduction, to get
6 customers back in the store, to have the foot
7 traffic, to get the margins, we simply have
8 to honor those things. The only cash number
9 other than honoring those kinds of things,
10 which are warranties which are often provided
11 by third parties, is the one we have -- we
12 have a weekly refund that we occasionally
13 have. And so we're on budget for customer
14 practices. You will see a 1.1 million dollar
15 number each week. I can't say that that's a
16 hundred percent accurate of the refund we
17 took up a model what it is during this
18 period. We would like to be able to refund
19 people's money if they are not happy with
20 Circuit City goods. We think it is critical
21 to the business to have customer satisfaction
22 as I have said in the introduction. As Mr.
23 Besanko will testify, one of the issues we
24 have is a very low customer satisfaction, and
25 our job now is to bring the customers back in

1 foot traffic. We think it is critical to the
2 operation of the business. I don't know if
3 you'd like to hear testimony from Mr. Besanko
4 on this or any of the other people I have
5 available, but we would ask Your Honor to
6 approve the customer practices.

7 THE COURT: Any party wish to speak
8 in opposition of this motion? All right.
9 This motion will be approved.

10 MR. GALARDI: Thank you. Your
11 Honor, I am now up to item number 13 on the
12 agenda, which again is the prepetition
13 relief. It's prepetition shipping and
14 delivery charges. Obviously with goods going
15 across the country through all sorts of
16 shippers and vendors, many goods will be
17 caught up currently in transit. We may owe a
18 certain amount of shippers amounts of money.
19 Sometimes we get letters from those shippers
20 that we are not going to deliver those goods.
21 We are going to essentially get a warehouse
22 lien or other lien on those goods if you
23 don't pay us either the prepetition amount or
24 some amount. We are not going to deliver
25 those goods. What this motion says is we

1 estimate there could be as much as 10 million
2 dollars in transit or prepetition amounts
3 that we might not receive goods. We believe
4 that we would only pay these goods -- and
5 this again is in our discretion -- only if
6 those shippers are owed less than the value
7 of goods we can sell at retail. So we have
8 said that we could owe as much as 10 million
9 dollars of prepetition freight. We would ask
10 Your Honor to approve that we could make such
11 payments. Although we can sue people on
12 state violations and all sorts of things,
13 it's probably more expensive and more time
14 assuming and too devastating to stand up on
15 those bankruptcy rights. So we would ask
16 Your Honor to approve our ability to pay in
17 our discretion up to 10 million dollars to
18 prepetition freight to secure this.

19 THE COURT: Any party wish to speak
20 in opposition to this motion? It will be
21 granted.

22 MR. GALARDI: Your Honor, the next
23 matter on my agenda is item number 14.
24 Again, in the normal course of business the
25 company has various contractors building

1 parts of the stores, modifying parts of the
2 stores, modifying the heating and the HVAC
3 systems in the stores. Your Honor, as things
4 became tight we began to not pay people as
5 often or frequently as they may like. We had
6 filed approximately about 1 million dollars
7 worth of already mechanic's liens that we
8 know of, plus when we looked at our system
9 there's probably as much as 5 or 6 million
10 dollars of potential secret liens, mechanic's
11 liens, contractors' liens that could be
12 filed. So we have sought here again
13 authority to be able to relieve ourselves of
14 those liens in the amount of \$6,500,000.
15 Again, as we sit here today we've got notice
16 of 1 million dollars. We're not going to pay
17 people if they don't file their liens. We
18 are not going to pay those people if they are
19 not valid, not perfected, but, again, if we
20 do have valid protected liens, rather than
21 litigate they are secured claims. We don't
22 need to have the interest charges. We ask
23 Your Honor to allow us to pay those even
24 though they are prepetition claims but they
25 would be secured by state law liens or

1 otherwise and we would have to pay them by
2 the end of the day and we would ask Your
3 Honor to approve the authority to up 6.5
4 million dollars. Again, all of these are
5 interim relief. We can come back if we have
6 an opposition to it. It is only what we
7 would have to pay in the meantime and it is
8 close to 6.5 million dollars.

9 THE COURT: Does any party wish to
10 speak in opposition to this motion? It's
11 granted.

12 MR. GALARDI: Your Honor, the next
13 matter on the agenda is a motion to pay
14 various foreign vendors. Your Honor, we
15 clearly have a lot of foreign names in
16 various pool. We have the Samsungs, the
17 Sonys, the LGs. That's not who we are
18 seeking to pay through these motions.
19 Instead, we are seeking to pay those people
20 who are foreign vendors that are not subject
21 to the jurisdiction of the Court and
22 enforcement of the automatic stay and whose
23 goods we actually need. And with respect
24 that, Your Honor, again, we do have such
25 vendors. We are asking the authority to pay

1 up to 6.5 million dollars to those vendors.
2 At the present time we don't know exactly how
3 much is exactly being demanded. What we are
4 doing again is we don't have a critical
5 vendor motion here today and this is our way
6 of dealing with what we think are essentially
7 critical foreign vendors that we can't incur
8 stay violations, we can't get the goods, and
9 in the discretion of the management think
10 that we need to get those goods. A lot of
11 these vendors often have documents and we
12 have fees remaining to pay cash at this point
13 to receive those goods, and, again, going
14 into Black Friday to the extent that we can
15 get these goods in we think it is essential
16 to our reorganization efforts, and so under
17 the Bankruptcy Code although they are
18 prepetition they are not secure. We would
19 ask Your Honor to pay foreign vendors up to
20 the same, 6.5 million dollars.

21 THE COURT: Anyone wishes to speak
22 in opposition to this motion? It will be
23 granted.

24 MR. GALARDI: Your Honor, the next
25 on the agenda is number 16 which is our

1 motion to continue our insurance policies and
2 all insurance policies, including DNO
3 insurance policies. Your Honor, with respect
4 to the insurance we think that we are up to
5 date and all premiums are paid for the
6 prepetition period. I don't know of
7 insurance companies that actually ever bill
8 in arrears. In fact, they usually front load
9 it in the period. Nonetheless, to give them
10 comfort that we have the money to pay we want
11 the authority. As to insurance in general we
12 believe it is ordinary course type of
13 payment. We probably don't need authority
14 but it is always good to grant this sort of
15 authority. Your Honor, to be candid, we have
16 the DNO policy. That's fortunate or
17 unfortunate would be -- we are in
18 negotiations with them December 1st
19 terminating obviously. Keeping the board and
20 having people available to us is critical. I
21 have had a lot of experiences. I expect
22 insurance companies under the circumstances
23 will probably raise our premiums but we
24 wanted to come into court to let you know
25 that we are in fact negotiating it. We do a

1 big number of this budget of 9 million
2 dollars. We are hoping that we can do much
3 less than that, Your Honor, but to keep our
4 board, to keep the management and everyone
5 operating and to feel comfortable with their
6 responsibilities and not to be concerned, we
7 do think it is an ordinary course. We will
8 try to keep the number as low as possible.
9 As I have explained to the board at times,
10 you know, once you're in bankruptcy Your
11 Honor determines the outside of the ordinary
12 course and whether it is appropriate. It is
13 really the tail period and what's going to
14 happen here, and to keep the people who have
15 been most familiar with the company and
16 management we think it is essential to
17 approve our being able to negotiate in good
18 faith the lowest possible premium to secure
19 the insurance the company has historically
20 had.

21 THE COURT: I agree. I think it is
22 ordinary course. I will certainly grant this
23 motion.

24 MR. GALARDI: Thank you. Your
25 Honor, the next one is, again, somewhat of a

1 procedural motion that we use. It gives us
2 some help with respect to vendors. It is a
3 motion seeking four forms of relief. The
4 first form of relief is just confirm that if
5 somebody has goods in transit and they
6 deliver them post petition they will be paid
7 for those goods post petition. It is a
8 benefit to the estate. It is a 503(b)1, but
9 in many times in my experience that people
10 call -- if I deliver these goods today am I
11 going to get paid for them? It is almost a
12 comfort order for the average person. Here's
13 the order. See the title. The Judge says we
14 can pay this. We've already gotten calls
15 today from vendors saying, how do I know
16 you're going to pay me tomorrow? How do I
17 know you have the authority to pay me
18 tomorrow? This order solves that problem and
19 we think it is an abundance of caution
20 relief. The second part of this is to say we
21 pay in the ordinary course. The third is if
22 we get goods that we want to return -- and
23 again it has to be something we want to
24 return. There are buckets I believe in the
25 facility that says you can't just return

1 anything. But if it is really stuff that's
2 better to return, we want authority to
3 return. And finally we established
4 essentially a notice procedure for people to
5 file reclamation claims. It is not really
6 procedure in the sense of paying and
7 reconciling it. It is just confirming that
8 you have to give us the demand under the
9 Bankruptcy Code in 20 days. We reserve all
10 of our rights. You reserve all of your
11 rights. It does not preclude people from
12 coming in. If they want to get TRO and
13 injunction in an adversary proceeding, it
14 doesn't preclude them from doing it. We are
15 reserving all of our rights for defenses, but
16 it is a way that we can set procedures for
17 them to file it and then start to gather
18 these claims.

19 Why is it important to the debtors
20 at this time really leads into the next
21 motion is that we need to -- actually it is
22 another motion, 503(b)9. There's an
23 interplay as Your Honor knows from BAPCPA
24 between reclamation claims and 503(b)9
25 claims. 503(b)9 claims are not really

1 perfect reclamation claims. They're within
2 the 20 days as opposed to the 45 days. Those
3 are all constituting the administrative
4 claims and secure claims that we have to
5 address. Given the time frame in which we
6 are trying to run this case we think it is
7 very advantageous to have bar dates
8 immediately with respect to periods so we can
9 start to gather the information to formulate
10 a plan and what we would have to do to exit.
11 We would ask Your Honor to approve it. I
12 know there is a gentleman in the courtroom
13 that has a warehouse, and what we have agreed
14 is that -- and this will go to the other
15 motion. We are not going to return his goods
16 in that sense. He keeps his lien to the
17 extent he has a lien and we've discussed the
18 relief and this is not trying to change any
19 of his rights whether he has a warehouse lien
20 or another property in that. I don't know if
21 there is anybody else that concern about this
22 motion.

23 THE COURT: Does anybody wish to
24 speak to this motion?

25 MR. ENGLANDER: Yes, Your Honor.

1 Good afternoon. Brad Englander. I represent
2 Alliance Entertainment Corporation Source
3 Interlink Media, LLC. My clients basically
4 supply CDs, DVDs to the debtor and all their
5 stores and other related merchandise. Some
6 of what my clients do is sell products. Some
7 of it is warehouse products and provide for
8 fulfillment services. I don't think we have
9 an opposition to the motion itself. I think
10 we have very little opportunity to review the
11 form of the order. I understand from Mr.
12 Galardi's comments that there is an
13 opportunity still to object to these orders
14 being entered on an interim basis and that
15 there is not an attempt here to deprive us in
16 connection with the return provision, in
17 particular substantive rights that are
18 available under applicable documents not
19 bankruptcy law or bankruptcy code. So we
20 don't oppose the entry of the order if in
21 fact it is still subject to some sort of an
22 objection period and we can work with the
23 debtor to develop some language that gets us
24 a comfort level.

25 THE COURT: That was certainly my

1 understanding being entered on an interim
2 basis until such time we can get any
3 objections resolved, and it's also my
4 understanding or at least my interpretation
5 what was being asked for is really to confirm
6 basically what is in the bankruptcy code and
7 really not anything -- any additional
8 substantive rights?

9 MR. ENGLANDER: I think mostly
10 that's correct, and I think that's what the
11 intent is. We have concerns whether some
12 language in particular dealing with return
13 rights might leave out protections the
14 Bankruptcy Code provides us, but I think we
15 will be able to work through that.

16 THE COURT: Very good. Thank you.

17 MR. GALARDI: And, Your Honor, I can
18 affirm I think it is the Bankruptcy Code.
19 The only language I've ever had objected to
20 is sometimes people had goods returned to
21 them objected and they actually have to
22 accept the goods, and our language may be a
23 little ambiguous on that point. But, again,
24 we can make that in terms of we can resolve
25 it, and we are not trying to do anything but

1 to get an order to shippers to deliver goods.

2 THE COURT: Very good. On that
3 basis the Court will approve the motion.

4 MR. CARRIGAN: Your Honor, this
5 Daniel Carrigan from McKenna, Long and
6 Aldridge on behalf of the Bethesda Office,
7 LLC, one of the debtors vendors. I apologize
8 to the Court and counsel. I was unable to
9 hear a good bit of what Mr. Englander and the
10 other gentleman had to say. I suspect we
11 will come out in the same place, but if I
12 may, Your Honor, may I outline some of the
13 things we think need to be addressed in
14 connection with this motion.

15 THE COURT: You may.

16 MR. CARRIGAN: Thank you, Your
17 Honor. The paragraph two of the proposed
18 order indicates that the vendors shall have
19 administrative expense claims with the
20 appropriate priority. However, paragraph
21 three says -- and I'm not sure whether this
22 is contrary to counsel for the debtor had to
23 say -- but they are authorized but not
24 obligated to pay the undisputed obligation
25 arising from post petition shipment for

1 delivery of goods, and that would be
2 something that on a final basis would have to
3 be addressed. Secondly, in connection with
4 the provisions for the reclamation claims and
5 the 503(b)9 claims the paragraph -- I think
6 proposed paragraph 5(d) indicates that in the
7 event the debtors and the reclamation
8 creditors agree upon and allow reclamation
9 amounts, the debtors would be authorized to
10 make payments or be required to return the
11 goods sought to be reclaimed. If this is too
12 far down the line, the notion of an actual
13 return of goods is going to be -- or goods
14 the vendor wants to get back is going to be
15 somewhat illusionary. So if there is a
16 relatively short time between -- and the time
17 there's a hearing perhaps on an interim
18 basis, it would work, but we would ask it is
19 not a license for the debtor to do whatever
20 it wants with products in the interim that
21 would be outside applicable law.

22 THE COURT: All right. Very good.
23 The Court was going to approve the order on
24 an interim basis so that these types of
25 objections could be made. And I suppose we

1 would do that within the next 30 days.

2 MR. GALARDI: Your Honor, I was
3 thinking that all of the ones that are on
4 interim would be the first time which is
5 hopefully in the next 30 days. So I have no
6 objection to that.

7 THE COURT: Were you able to hear
8 that?

9 MR. CARRIGAN: No, Your Honor, I was
10 not.

11 THE COURT: We will set that -- we
12 will approve the motion on an interim basis
13 reserving your objections as you have
14 outlined them, and we have that hearing at
15 the next omnibus hearing date which would be
16 within the next 30 days. We will set those
17 dates at the end of this hearing.

18 MR. CARRIGAN: We understand. Thank
19 you, Your Honor.

20 THE COURT: Thank you.

21 MR. GALARDI: Your Honor, I would
22 ask now to move out because they are related
23 and I looked down and I guess my agenda got
24 changed. If we can move to item 21, which is
25 really the motion to procedures with respect

1 to 503(b)9 claims. I think it is fairly
2 straightforward, Your Honor, and it is a
3 procedure that we have adopted. As Your
4 Honor is aware, the BAPCPA changed the
5 Bankruptcy Code to provide the claims for
6 goods delivered to the debtor in the 20 days
7 prior to the bankruptcy that a person may
8 seek to file an administrative claim under
9 503(b)9. Your Honor, again, it is a very
10 significant change to the Bankruptcy Code
11 because it sets up administrative expenses
12 that would have to be paid to exit bankruptcy
13 because a 503(b)9 claim is a 507(a)2 claim
14 which then has to be paid under 1129(a)9. I
15 like giving all of those numbers. Your
16 Honor, it is important to us to set a bar
17 date for that and to give out a proof of
18 claim form so we do not let those linger. In
19 addition, because of the language the cases
20 unfold, especially with a retail debtor, you
21 have the overlay of 526 and I have to be
22 litigating whether 502(d) is applicable,
23 whether you can then use a preference defense
24 to various circuits. These are all
25 initiatives. And it is just helpful to get a

1 bar date set for all of these so we can sort
2 of say, well, if you didn't get your
3 reclamation, congress changed that. I
4 understand what the gentleman said, but
5 congress changed it. Their only right right
6 now, unlike the old code, is to take back the
7 goods as secure credit. It is no longer
8 about administrative claims they used to get.
9 This gives us administrative claims. If you
10 fail to do certain things, gives you proper
11 demand but it is in a 20 day window. For
12 those reasons, Your Honor, we would like to
13 establish the bar date set for in that motion
14 for people filing 503(b)9 claims. We don't
15 think it's a hardship that -- they can
16 probably calculate what they believed they
17 delivered in the last 20 days and file a
18 proof of claim. I think we have given 30
19 days as we've requested. We will give notice
20 out to people, including a form of order to
21 our vendors and ask that they file a proof of
22 claim within 30 days of the entry of the
23 order for 503(b)9. I know the official proof
24 of claim form says you don't have to file
25 administrative claims for post petition

1 claims but it still constitutes that you can
2 use administrative claims for prepetition
3 period. I don't know if that was intentional
4 or just an action that happened to work for
5 us. So we basically take that form and give
6 them a proof of claim form that says 503(b)9.
7 It is actually 30 days to a date of service
8 of the bar date. That's what we ask for,
9 Your Honor. And we think that will help
10 coordinate in all the work we have to do in
11 the first 60 days in this case to understand
12 what kind of financing we need to make a
13 hurdle in that 60 days to 120 days I
14 mentioned early on.

15 THE COURT: Any parties wish to
16 speak in opposition of this motion? All
17 right. That will be approved.

18 MR. GALARDI: And that was item 21,
19 Your Honor,

20 MR. CARRIGAN: Your Honor, excuse
21 me. I'm sorry. This is Dan Carrigan again.
22 I hate to be the left wing in this
23 discussion. May I be heard on this, please?

24 THE COURT: Yes, you may. This son
25 setting a bar date on reclamation claims.

1 MR. GALARDI: On 503(b)9.

2 THE COURT: 503(b)9 claims. I'm
3 sorry. Thank you.

4 MR. CARRIGAN: Yes, Your Honor.
5 There are probably a fair number of
6 reclamation creditors who are out there who
7 from past experience in the courts in
8 Delaware and New York and Florida that we
9 found that the negotiation of the terms of
10 the parties -- while we have no objection to
11 setting one and getting it under way, and
12 we're not trying to be obstructionists and be
13 a problem, I think my client and we would
14 like to be helpful in this. I think counsel
15 for the debtor referred to it as lets get a
16 vendor before we're planning all of this and
17 we would as well as soon as possible. But
18 perhaps the way to do this would be to give
19 people an opportunity -- set the bar date but
20 give opportunities to folks, reclamation
21 creditors in particular, and then perhaps
22 even an ad hoc group or official committee to
23 come in and ask for modification or changes
24 without prejudice at this stage instead of
25 being stuck with what I'm hearing is most

1 people have not had the opportunity to
2 review.

3 THE COURT: I don't know if I
4 understand your objection. Are you saying
5 that you don't think there should be a bar
6 date or do you say that the bar date being
7 suggested here is an unreasonable bar date?

8 MR. CARRIGAN: No, Your Honor. We
9 agree that there ought to be a bar date. We
10 don't have an objection to setting one out in
11 the future, but as to the terms how the
12 reclamation claims are established or not
13 established, burden of proof and all that
14 sort of thing, those sorts of things are also
15 addressed in the bar date order, and that all
16 we are suggesting is those terms, not the bar
17 date itself, but the terms ought to be open
18 for some review and discussion before they're
19 fixed at the only way to get a reclamation
20 claim established. I'm sorry, 503(b)9
21 established. So there could be a short
22 period during which this would be sent out,
23 and if you have problems with the form and if
24 nobody objects or nobody responds, then there
25 is no need for a hearing and it can go

1 forward on the basis of here. If people do
2 object, if people do respond, then perhaps
3 have a final hearing on the terms of the
4 503(b)9 process.

5 THE COURT: So what you're saying is
6 you don't have any objection to establishing
7 the bar date but that you want the approval
8 of the order on an interim basis with regards
9 to the claims procedures set forth in
10 paragraph eight of the proposed order?

11 MR. CARRIGAN: Yes, Your Honor.

12 THE COURT: Okay. Do you wish to
13 speak to that?

14 MR. GALARDI: I do, Your Honor.
15 There are two problems with it. First, I
16 don't think we change any burden. I think
17 503 has the burden. It is an administrative
18 claim. I believe they have to show a -- you
19 know, they have to carry their burden to
20 satisfy this. I also don't see this as
21 changing any burden to requesting. And what
22 we are really requesting is to facilitate
23 this, and I think what is quite consistent is
24 proof of delivery within the 20 day period in
25 which they have to do to file a claim. We

1 just made it very clear. The only thing
2 we're doing is we're asking that we make it
3 clear in the 20 days. I think that each
4 individual vendor -- and very much like any
5 other bar date, Your Honor, if they don't put
6 in all of this information, we have to do an
7 insufficient documentation they should not
8 have a right. You still have a claims
9 process. You still have a resolution. So we
10 don't think we have done what he's objecting
11 to. The second thing is, if we don't put
12 something in here for these kinds of
13 procedures for what's necessary to file a
14 proper claim, we can't sent the notice to set
15 the 30 days because people won't tell us the
16 information. So it is pretty much a useless
17 process. They can put in one piece of paper
18 that says I assert a claim for 10 million
19 dollars. So that doesn't do us any good
20 because. The whole purpose -- like any other
21 administrative claim they have to carry their
22 burden and show there was a delivery, where
23 it was delivered, to whom it was delivered
24 and what value was delivered, and that it was
25 delivered in the ordinary course. And if you

1 go through our procedures, that's exactly
2 what it asks. It says they must identify the
3 particular invoices very much like a
4 reclamation demand. They have to say what
5 claims that they have reclaimed. So if they
6 have filed both a reclamation claim in 20
7 days and 503(b)9, that's different
8 implications for a state. One could be
9 administrative. One, they have to show they
10 had goods on hand on the date. 503(b)9 --
11 you just don't have to be on hand. We could
12 have sold those today and it doesn't matter.
13 So that's all you need to know. Which one do
14 you want to assert here? The next section
15 says must include certification that the
16 goods were sold in the ordinary course of
17 business. That's what the statute says and
18 it has to be ordinary course of business. So
19 it tells us it has to be ordinary course of
20 business. It is not different than the proof
21 of claim form that filed under proof of
22 perjury. So we think all we've done is
23 broken out what would be required to carry
24 the burden in this first instance. And I
25 think if we take those procedures out, I

1 don't think it gets in another. That being
2 said, if somebody doesn't satisfy this, I'm
3 sure Your Honor for excusable neglect or any
4 other OGA standard can say, okay, they didn't
5 put in a piece of paper but that's not enough
6 to disallow their claim, and that's claims
7 projection profits. We are really trying to
8 get notice and as much information as we
9 think is legitimate in 30 days.

10 THE COURT: Well, as I understand
11 the objection that's stated as far as the
12 terms are concerned it's not disagreeing that
13 they shouldn't be in the order but just on an
14 interim basis so they might have an
15 opportunity to study them and see if some of
16 these procedures are objectionable given the
17 fact they have only had notice of this
18 offense in this case for, you know, not even
19 10 hours and not had a chance to look at it.
20 And so if there is something in here that
21 would be for some reason burdensome or
22 something, they would have an opportunity to
23 come back and say perhaps they should get
24 some other form of relief.

25 MR. GALARDI: And, Your Honor, I

1 have no problem with that on an individual
2 basis. For example, this gentleman comes in
3 -- and even if it is after the 30 day bar
4 date, if someone comes in and says I didn't
5 satisfy this particular and the debtor is now
6 raising an objection past that, my
7 understanding is that they can always come
8 back and say these procedures don't bind me.
9 Just because I didn't attach invoice five
10 doesn't mean I don't have a 503(b)9 claim.
11 I'm not saying these procedures to be all and
12 end all. Now, they don't have an invoice at
13 the end of the day. So I don't think it is
14 precluding them. If we put the procedures
15 in, I guess my only question is let's assume
16 we go forward, let's assume the procedures go
17 out, and let's assume 30 days from now
18 someone says I want to change the procedures.
19 Well, I have just mailed notice to a large
20 number of creditors. What does that do? I
21 have do another notice. No. I think what it
22 does is if you comply, fine. If you don't
23 comply, Your Honor has the equitable power to
24 say, look, I remember the dialogue on the
25 record. I remember somebody complained about

1 it. I'm not going to live by the letter of
2 procedures. This is not supposed to be a
3 technical hurdle. This is supposed to be to
4 get the debtor information.

5 THE COURT: All right. Counsel on
6 the phone, do you have anything further that
7 you wish to say?

8 MR. CARRIGAN: Just two
9 observations, Your Honor. One is
10 establishing excusable neglect and what have
11 you. It's a different exercise than
12 establishing that there is a special problem
13 with the -- and I'm not saying this is a
14 special problem. Please understand that. It
15 is just that if you're going to have -- I
16 don't know how many 503(b)9 claims they are
17 anticipating, but apparently it is a big
18 enough number that they would anticipate a
19 sort of one size fits all approach to them,
20 and given that situation and also the
21 situation that in 503(b)9 it actually says
22 after notice of a hearing there shall be
23 allowed administrative expenses for including
24 and in this case the value of the goods and
25 so forth. They are also asking for a

1 certification in here that the goods were
2 delivered in the ordinary course of the
3 debtors' business. That is an easy basis for
4 objection as to how would you know what the
5 debtors' -- ordinary course of the debtors'
6 business with respect to that particular
7 vendor who is filing. So I think it is not a
8 question of a wholesale changes in this
9 thing. It may be -- if any. But at least it
10 is an opportunity for people who have just or
11 just seeing this for the first time to say in
12 my experience this has all always led to
13 something maybe that's not even foreseeable
14 in its current form on the first day. And in
15 virtually every other case, Fleming,
16 Ameriserv and others where we have this kind
17 of order that has taken place after a sum-up
18 to study the procedures and have an
19 opportunity to suggest changes to the debtor
20 and if not to the debtor to the Court.

21 THE COURT: All right. Thank you.
22 The Court has had the opportunity to study
23 this order, and I have looked at the claims
24 procedures that are set forth in the order.
25 They appear to be very reasonable to me. And

1 I understand the debtor's concern about
2 getting notice out and having to make sure
3 that that notice gets out within the time
4 frame. So the Court is going to overrule
5 your objection to the motion, and I'm going
6 to grant the debtor's motion as it is in its
7 entirety.

8 MR. GALARDI: Your Honor, again, you
9 can hold me to this, we are not trying to
10 hold -- change the burden.

11 THE COURT: I understand. I think
12 in saying that I think the Court can deal
13 with the kinds of issues that counsel has
14 raised in objection on a case by case basis
15 as they come up. So one size doesn't fit
16 all. The Court can certainly deal with those
17 kinds of exceptions on a case by case basis.

18 MR. CARRIGAN: Thank you, Your
19 Honor.

20 MR. GALARDI: Thank you, Your Honor.
21 Your Honor, now we are on 18 which Your Honor
22 is the, I guess, guard to pay all of this
23 relief that we have now asked for and Your
24 Honor has granted. We need approval of our
25 debtor and possession financing. Your Honor,

1 with respect to this, again, I will defer to
2 Your Honor as to the witnesses. First of Mr.
3 Besanko is, in fact, in the courtroom today.
4 He submitted an affidavit. I have two other
5 people that if called as witnesses could also
6 testify with respect to the findings with
7 respect to there is no other financing. The
8 names are Mr. Robert Duffy of FTI Consulting
9 and Mr. Bernard Fountain of Rothschild . Your
10 Honor, just very briefly, again, I think in
11 stark -- to give Your Honor -- if Your Honor
12 doesn't mind, I will proffer in general the
13 testimony as to those three.

14 THE COURT: That will be fine with
15 me. I will let anybody who wishes to
16 cross-examine anybody, put them on as
17 witnesses if someone wants to cross-examine,
18 but otherwise I'm willing to accept the
19 proffer and I have read the affidavit.

20 MR. GALARDI: Your Honor, thank you.
21 With respect to this, and I will tell it more
22 as a history and any of the three gentlemen
23 could be called as a witness, could testify,
24 that debtors in prepetition were in agreement
25 with the lenders lead by the agency Bank of

1 America with respect to the 1.3 billion
2 dollar commitment, that as debtors proceeded
3 to have liquidity issues they began
4 negotiations with the current bank group
5 regarding potential financing options. In
6 addition, that the debtors explored through
7 their restructuring personnel and themselves
8 alternative types of financing, whether it be
9 on an unsecured basis, a junior basis as well
10 as a priming basis. Your Honor, what the
11 debtors have found is there is no other DIP
12 financing and for very good reasons. As I
13 mentioned at the outset and as the witnesses
14 would testify, first of all, and as Your
15 Honor is well aware, the market currently for
16 getting financing has been an incredibly
17 difficult market. Second, retail lending and
18 ABL lending is an incredibly difficult
19 market, and as we went through this and as
20 the witnesses will testify we happen to have
21 three or four major retail lenders in the
22 group already. So in order to obtain a
23 different type of financing we would have to
24 go to a different type of lender. We have,
25 for example, Bank of America, Wells Fargo and

1 GE. And if Your Honor reads the papers and
2 sees the other debtors in possession of the
3 retail world, it's one of those three that is
4 engaging in all of the lending. So we
5 pursued our lending with respect to other
6 potential lenders. Rothschild is out
7 soliciting alternative lenders. As I
8 mentioned in my presentation and as Mr.
9 Besanko will testify we did secure or have
10 commitment or a proposal to secure second
11 lien financing with a potential bank group or
12 potential lender group -- they are not banks
13 -- for second lien financing. We have gotten
14 all the way to a commitment letter that had
15 covenants with respect to which we are still
16 open but wanted a 4 million dollar sort of
17 downstroke to keep the commitment to get to
18 the December 3rd date and we didn't know what
19 the covenants were. We just couldn't get
20 comfortable that the covenants would be the
21 same as the ones that are in the current
22 banking facilities that we are seeking
23 approval for, and indeed we were concerned
24 the covenants would be even stricter and
25 therefore potentially cause us to default.

1 In addition, Your Honor, in looking for that
2 facility we went back and went through an
3 analysis with the company, and Mr. Besanko,
4 if called as a witness, would testify that he
5 considered and the board considered and the
6 advisors considered other forms of financing
7 and other restructuring alternatives. The
8 company considered just simply saying it is a
9 Chapter 11 liquidation, let's simply go out
10 and do all the store closings. Fortunately
11 or unfortunately, there are too many
12 retailers currently right now in that
13 process. So you even get people to bid --
14 for example, on our 155, all we kept hearing
15 was there was not enough capacity in the
16 market to have that sort of thing nor did we
17 think it was wise. The board has determined
18 that there is a hope for this company to
19 either restructure itself -- the gentleman on
20 the phone has already said he would support a
21 vendor plan. And we have -- and as Mr.
22 Rothschild would testify and as Mr. Fountain
23 would testify Rothschild was retained to
24 pursue strategic alternatives with respect to
25 the 366 sales. As we stand here today we

1 have significant interest from a number of
2 buyers, and some of those buyers are
3 including possibly providing subordinated
4 financing. None of those buyers were
5 prepared on this term to give us their first
6 lien facility. No one is prepared to prime
7 the Bank of America, and the debtors are
8 simply not prepared to go into a priming
9 fight on the first day because of the kind of
10 instability that will lead to business. Nor
11 was anybody in a secured loan facility
12 willing to step outside and do their own
13 facility. They are right now doing all the
14 retail cases together and they are
15 particularly willing to take a greater
16 commitment to provide the financing
17 separately so one group could stay with the
18 same bank group. There was no lender
19 prepared to do a subfacility in that group
20 that would have provided the liquidity that
21 we needed on the time we needed with the
22 covenants that we needed. And then the
23 company considered the use of cash
24 collateral. Your Honor, based upon a review,
25 and it makes sense in this instance, if you

1 look at the inventory value, we are currently
2 getting -- I think it is about 75.5 percent
3 on cost of inventory based on the appraisal.
4 Currently the company has approximately 1.2
5 or maybe even more, 1.3 billion dollars of
6 inventory. So we believe that the lenders
7 are over secured at this particular point in
8 time -- and if called to testify -- based
9 alone on the inventory, and there are other
10 additional assets. Your Honor, we could have
11 tried to do a priming fight for that reason,
12 but there would have been fights, fees, and,
13 as I said, re-instability of the business.
14 Nonetheless we pulled out our bankruptcy code
15 and tried to determine whether the use of
16 cash collateral can satisfy us here or
17 nonessential cash collateral. As we explored
18 the cash lateral option originally, the cost
19 of such a cash collateral, especially in this
20 market is, one, the company was doubtful it
21 could simply live off cash collateral by
22 itself. Though we don't get a lot of
23 availability the 20 million dollars is enough
24 to make a cushion as Your Honor sees in the
25 motion, and it get us through a time. As we

1 go into essential cash collateral it was our
2 belief that and the company's belief that you
3 would get just as restrictive covenants as
4 you see the packages that you're getting
5 today with respect to the covenant packages.
6 Even in cash collateral you get a restrictive
7 covenant package and it is not free. It's
8 very expensive and maybe as close. As Mr.
9 Daunton (Ph) would testify and Mr. Duffy
10 would testify, it is not clear that the cost
11 of a consensual cash collateral be all that
12 much less than what Your Honor sees here. We
13 also considered let's try to avoid the fees
14 altogether and let's think about
15 nonconsensual cash collateral arrangements.
16 Frankly, we threw that at the bank group and
17 that is what basically got us to the facility
18 that we have. There was an earlier date by
19 which we would had to have a subfacility. We
20 got that to the January 17th date. At the
21 date that we threw that in the bank's way we
22 had four covenants. We got down to two
23 covenants. Again, Your Honor, to start a
24 case with a nonconsensual use of cash
25 collateral, one, we are not sure we can live

1 with cash collateral by itself, two, you
2 don't have an LC facility with cash
3 collateral, and, three, you start a case
4 telling your vendors we are going to live all
5 cash collateral. It doesn't send a good
6 message to the vendor community, and Your
7 Honor may know the Wall Street Journal has
8 always said the reason we are here we
9 couldn't get a DIP facility. That's not
10 true. We could get it. We just had to get
11 the best one we could under the market.

12 With respect to facility itself,
13 Your Honor, we did have a discussion with the
14 U.S. Trustee a little bit about disclosing
15 the fee letters. We have opposed and filed a
16 motion under seal to not disclose fee
17 letters. That being said, we have disclosed,
18 as I said in a gross term, and we can use
19 gross in many ways, we have used gross in the
20 terms of the fees and advisory fees with
21 respect to this. The number that I have
22 given you, the 30 million on that page, is
23 really 27. Those are all fees, all expenses
24 for all the parties. We don't think it was
25 -- we filed the motion under seal. It is for

1 pricing for Bank of America and other
2 lenders. We decided it was not appropriate
3 to give the specifics of those fee letters,
4 but for disclosure to the Court those numbers
5 do include all of the fees and the price tag
6 for the facility. Your Honor, again with
7 respect to what we are obtaining for this, we
8 are obtaining, I think, in just basic --
9 obviously when you go into bankruptcy you
10 have a default. If you have a default, you
11 cannot get a commitment to lend and lenders
12 do not have to lend to you. We are getting
13 our commitment to lend and to continue the
14 commitments subject to the borrowing base.
15 The commitments are being reduced, but as I
16 mentioned earlier, and Mr. Besanko will
17 testify, we don't have sufficient collateral
18 to get up to the cap. We don't expect to
19 have sufficient collateral to get up to that
20 cap. So we don't think we are getting up to
21 anything in this term, at least with respect
22 to the short term commitment.

23 THE COURT: Why do you have the cap
24 so high if you don't expect to get there?
25 Because you have an unused commitment fee,

1 too.

2 MR. GALARDI: There is a commitment
3 fee. Well, there's two things. One, people
4 like to see big numbers, and it is important
5 to say I have a commitment. And if we had
6 gone to 1.3 to 900, we would have more
7 questions that I would have to answer right
8 now. Two, if we are successful, if we get
9 vendor terms, if we get credit terms, and we
10 get the goods in, we can then borrow more.
11 We just can't be sure. At this point on this
12 model with these conservative estimates it
13 was simply the fact. So to pay for a fee to
14 have the luxury of having a facility, indeed
15 as Mr. Besanko will testify, when we first
16 got the 1.3, we never thought we would get
17 there. What we got concerned about is in
18 October and given trade terms, what we
19 thought was we would actually end up getting
20 there. So the good news is we didn't get
21 there, and the bad news is we didn't get
22 there because we didn't get enough goods in
23 to be able to borrow as much as we would like
24 to. So, again, you like to have a nice
25 facility so you can tell the lenders in press

1 releases that we have a bank group that's
2 giving us 1.3 billion dollars. We have a
3 bank group that's giving us 1.1 billion
4 dollars. So we have reduced the commitments,
5 but, again, we think we are living within the
6 commitments. And it was a significant point
7 to the bank group to reduce the commitments.
8 So although we get very close to the
9 commitment of 1.1 and eventually the 900
10 comes in the December period, it was
11 important in part of the deal that the bank
12 group wanted was they would reduce the
13 commitment. They are financial incentives
14 for banks to not have outstanding commitments
15 in the same amount. So it was a *quid pro quo*
16 in one of the terms. In addition, as I
17 mentioned, the *quid pro quo* was that this
18 facility rolled on the first day or be taken
19 out on the first day. Again, Your Honor,
20 Kirkland and Ellis, whose application will be
21 put forth, has done most of the debtor work.
22 Kirkland and Ellis has reviewed the security
23 package to the perfection of liens, believes
24 they are properly perfected liens, and as
25 Your Honor knows, that binds the debtor but

1 it doesn't bind the committee to go and
2 review that. So we were comfortable with
3 what -- two things, one, that they were
4 properly perfected and, two, that they are
5 fully secure. So consequently -- and given
6 that that was another term, that it is not a
7 take it or leave it. I don't say that. We
8 had back and forth negotiations on slow
9 rolls, fast rolls. The problem with the slow
10 roll going into the interim hearing is it's
11 hard to figure out what's actually rolled and
12 what's not rolled. So in this sense it is
13 almost as if a new facility is being created
14 post prepetition with a different collateral
15 package. So we agreed to the role of the
16 facility on the first day to turn it into a
17 post petition. Again, as I mentioned before
18 and as being advised by the board and the
19 advisors, we agreed that we would be giving
20 up certain bankruptcy types of leverage that
21 we can have. Again, as the advisors would
22 testify to, if you're going in Bank of
23 America, GE and Wells, you have to come out
24 if you are going to come out with Bank of
25 America, GE or Wells. So they have

1 litigation essentially between, you know,
2 exit financing as well. So in this context
3 we thought that, you know, we are not going
4 to have a fight at the end of the case as to
5 whether I can reinstate the debtor, whether I
6 can cram up the secured lenders. We're going
7 to need a friendly face at the end of this if
8 we can exit. In addition, Your Honor, even
9 in a 366 sale we understand enough about the
10 retail market that there is very good
11 likelihood if somebody wants to acquire this
12 they are going to go to GE, Bank of America
13 or Wells. So, again, it was to take an issue
14 off the table. I understand why the banks
15 did it and these were results of
16 negotiations. Your Honor, we started these
17 negotiations with respect to DIP financing,
18 including a subordinated financing probably
19 over a month ago, one, to keep out of
20 bankruptcy and another. It has been
21 remarkable actually given the market. The
22 back and forth, give or take, the
23 negotiations as I have already mentioned,
24 including the last seven or eight days when
25 people thought we would be filing a week ago,

1 there was a bank group set with a -- asserted
2 default deadlines and a void date facility by
3 December 3rd with four different covenants
4 that we were very concerned about meeting and
5 paying as I like to say 30 million dollars
6 for 50 million dollars availability for four
7 weeks just wasn't palpable to the company.
8 We then pulled out the card of the
9 nonconsensual cash lateral. We had back and
10 forth negotiations with Bank of America whose
11 agent was helpful. We had back and forth
12 negotiations with GE and Wells Fargo. We
13 couldn't find another financial, but it gave
14 us the opportunity to say no to the
15 subordinated facility and essentially in the
16 company's mind buy us 60 days to come to the
17 next bridge as I like to say. Again, nobody
18 can guarantee these projections. No one can
19 guarantee that we make these projection but
20 we think they are reasonable under the
21 circumstances given the uncertain market. It
22 provides us sufficient availability. It has
23 limited covenant testing. We are testing on
24 December 13th. We have a minimum
25 availability that we have to maintain. We

1 have some covenants and essentially a block
2 that we can't go below 50 million dollars,
3 and I think it's the end of December or end
4 of January. There are step-downs as I have
5 mentioned, financial covenants, or rather we
6 go from a no covenant deal to what I will
7 call a covenant deal, but they are not that
8 aggressive covenants. There are certain
9 clean-down provisions. As we've said they'd
10 have to go from 50 million dollars from
11 January 4th through January 10th. We have a
12 facility that we need to have a subordinated
13 facility. If called to testify both Mr.
14 Daunton, Mr. Besanko and Mr. Duffy would say
15 that the negotiations with Bank of America
16 over these facilities is characterized by arm
17 strength, good faith negotiations. Mr.
18 Besanko would testify the absence of such a
19 facility, we have not -- we have basically
20 been on freeze for the last seven days, that
21 we are beginning to go into irreparable harm
22 because we would be unable without a facility
23 to secure goods that we need to get to Black
24 Friday. This is a critical time in the
25 business, and absent that we have had trucks

1 turned around as late as yesterday with
2 respect to this, and we need this money
3 immediately, that our business will suffer
4 irreparable harm, that we have some
5 availability but very limited cash. Without
6 this facility we will have greater
7 uncertainty in our workforce. We will be
8 unable to meet our payrolls as we have been
9 concerned for the last week, that we would be
10 unable to obtain goods in the short term and
11 not pay our rent and all of the expenses. So
12 absent relief in this facility and absent
13 payment of this facility the company will
14 suffer immediate and irreparable harm. In
15 addition, the advisors and Mr. Besanko will
16 testify the company was unable to secure
17 unsecured financing, financing on a
18 subordinated facility and indeed any other
19 alternative DIP financing.

20 Your Honor, also I just wanted to be
21 clear with respect to the motion, and I know
22 there are a couple of people in the
23 courtroom, the facility is essentially one
24 priming only itself and the prepetition debt
25 that it has. Your Honor, there is an

1 indemnity and there is a prepetition lien,
2 and that essentially stays in case somebody
3 wants to undue the facility at a certain
4 point and say go back to the prepetition
5 position. Your Honor, it is carved out for
6 two -- I don't know how we end up saying it,
7 but there is no nonconsensual priming of any
8 good valid first liens. So the gentleman who
9 may have a warehouse lien, if it is a good,
10 valid perfected lien, there is no priming of
11 those liens. We are not asking for a
12 nonconsensual prime. To the extent that
13 we're permitted prior liens in the bankruptcy
14 document we are not priming those liens.
15 We're still permitting prior liens. What
16 happens is the bank group's collateral
17 package now expands and by expanding that
18 package it is not priming. It is taking a
19 second with respect to anything that has
20 previous liens. In addition, Your Honor,
21 there are landlords here. They are not
22 taking a first lien except to the extent
23 perhaps the leases permit them to take so or
24 the mortgages. They are confined to their
25 state law rights. With respect to that they

1 are not trying to prime them. They are not
2 taking a lien on the leases themselves unless
3 they are permitted to do so and they are
4 taking a lien on the proceeds of such leases.
5 I think that is one of the concerns I had
6 heard from the lenders' counsel. Excuse me
7 one second. I'm sorry. Just to clarify,
8 they are not taking any liens on any leases.
9 It's just the proceeds. I think the language
10 says that, Your Honor. Your Honor, I don't
11 know if anyone wants to cross-examine Mr.
12 Duffy, Mr. Daunton and Mr. Besanko. I don't
13 know if Your Honor has questions that I can
14 answer. Each one, in particular Mr. Besanko,
15 we have looked through the factual findings
16 that Your Honor has called upon that there
17 are stipulations. Mr. Besanko has read that.
18 The debtor finds that they are true and
19 correct to the best of his knowledge. To the
20 extent they are not we just conclude that
21 there are some that are legal in nature. And
22 so we would ask Your Honor to approve the
23 financials, but I can subject any of those
24 gentlemen to cross-examination.

25 THE COURT: Does any party wish to

1 be heard on the motion or cross-examine any
2 of the proffered witnesses?

3 MR. POLLACK: David Pollack.

4 THE COURT: Mr. Pollack, hold off
5 just a minute. I have another counsel at the
6 podium and I will come back to you.

7 MR. LEHANE: Good morning, Your
8 Honor. Robert LeHane, Kelley Drye and Warren
9 on behalf of landlords with approximately 80
10 locations, Developers, Diversified, General
11 Growth and Morning Garden Realty. I believe
12 my comments will be similar to Mr. Pollack's.
13 If not, I'm sure he will follow up. I had a
14 brief conversation with counsel for the
15 lender and counsel for the debtor before the
16 hearing. One of the concerns the landlords
17 had in addition to the question of the direct
18 lien on the leases was lenders access to
19 store premises and collateral access in the
20 event of default under the DIP facility, and
21 the parties have agreed that the lenders
22 rights in the event of default will be
23 limited to whatever rights they have under
24 state law, whatever relief Your Honor is
25 willing to grant them on a motion on notice

1 and adequate time for landlords to respond or
2 whenever rights landlords gives them on
3 consent. I just wanted to put that on the
4 record, Your Honor. Thank you very much.

5 THE COURT: Thank you very much.
6 Any other party? I will come back to you,
7 Mr. Pollack. I haven't forgotten you but I
8 have other people that will speak first.

9 MR. MATSON: Good afternoon, Your
10 Honor. Bruce Matson here on behalf of Bank
11 of America and its agent. I wanted to
12 confirm the bank group is in agreement with
13 the representations regarding the lease
14 issues.

15 THE COURT: That were just recited?

16 MR. MATSON: Yes, sir.

17 THE COURT: Thank you, Mr. Matson.
18 Any other party?

19 All right. Mr. Pollack.

20 MR. POLLACK: Fortunately, Mr.
21 LeHane has already covered my points, Your
22 Honor. Thank you.

23 THE COURT: He warned me as much.
24 All right. Very good.

25 MR. HILLMAN: Your Honor, David

1 Hillman, as a housekeeping matter I would ask
2 the Court's indulgence to be heard even
3 though I haven't yet filed a pro hac vice
4 application nor have I affiliated with a
5 local firm.

6 THE COURT: You may be heard.

7 MR. HILLMAN: We represent Panasonic
8 Corporation of North America, and Circuit
9 City is currently in possession of products
10 that have been delivered to Circuit City by
11 Panasonic. These goods were delivered under
12 a consignment agreement, and under the terms
13 of the agreement Panasonic, not Circuit City,
14 has title to the goods. The goods -- excuse
15 me. The different consignment agreement that
16 was terminated prior to the bankruptcy case.
17 So Panasonic is planning on filing an
18 adversary proceeding for the turnover of the
19 goods that belong to it as well as a TRO and
20 a preliminary injunction from preventing
21 Circuit City from selling those goods. I
22 haven't had a chance to read every clause in
23 the DIP motion, in the DIP order in the DIP
24 credit agreement but wanted to -- I point out
25 inconsistency and to make sure that the DIP

1 credit agreement and the DIP lenders or that
2 the debtor wasn't granting liens on property
3 that it does not have title to.

4 THE COURT: All right. I certainly
5 don't know how it could.

6 MR. GALARDI: Your Honor, that's our
7 understanding. We can affirm that whatever
8 this order says, if we don't own the property
9 and it is true, a consignment, it is not our
10 property, we are not granting liens on it.

11 THE COURT: Did you hear that
12 representation, Mr. Hillman, from counsel for
13 the debtor?

14 MR. HILLMAN: Unfortunately I could
15 not, Your Honor.

16 THE COURT: All right. He confirmed
17 what the Court had said that the debtor was
18 -- nothing in the order or in the bank
19 financing is providing any kind of lien on
20 any property that the debtor does not own.

21 MR. HILLMAN: Thank you. I would
22 just ask for the debtor's counsel perhaps to
23 include that reference in his final interim
24 order that's submitted to the Court.

25 MR. GALARDI: We have no problem

1 with that, Your Honor. Again, we will put in
2 a sentence that says if it's not our
3 property, we are not granting liens
4 notwithstanding anything in the order. We
5 will be anxious to get the order entered.

6 MR. HILLMAN: Thank you, Your Honor.

7 MR. LUCIAN: Your Honor, John Lucian
8 and Regina Kelbon. We have similar concerns.
9 If I may defer to Ms. Kelbon. I'm a Virginia
10 attorney. We will be pro hac her into the
11 case, Your Honor.

12 THE COURT: All right. Ms. Kelbon.

13 MS. KELBON: Thank you, Your Honor.
14 I would like to thank you for allowing us to
15 participate telephonically. I do appreciate
16 that courtesy.

17 THE COURT: You're welcome.

18 MS. KELBON: I must say I'm having a
19 very hard time hearing Mr. Galardi who has
20 been very faint in and out.

21 THE COURT: That's not Mr. Galardi's
22 fault. That's the -- the equipment that we
23 have set up is not fully functional yet.
24 We've just moved into a new courthouse and so
25 that's the reason, but we're trying to make

1 do as best we can.

2 MS. KELBON: Thank you, Your Honor.

3 Your Honor, if Your Honor would indulge me
4 just for one moment to sort of explain the
5 relationships with the parties. We represent
6 Cellco, a partnership doing business as
7 Verizon Wireless, and Verizon Wireless is a
8 party to a direct sales agreement with
9 Circuit City. The relationship between the
10 parties is that Verizon Wireless operates a
11 kiosk in the Circuit City stores which is in
12 effect a separate Verizon Wireless store
13 within a Circuit City store. Verizon
14 Wireless has a presence and is substantially
15 in all of the stores. There is a handful of
16 them that Verizon Wireless does not operate
17 in. Pursuant to the agreement, Your Honor,
18 Verizon Wireless establishes and operates
19 merchandising and demonstration displays and
20 offers, sells and markets Verizon Wireless
21 services. The relationship provides Verizon
22 Wireless with complete control over the sale
23 and marketing of its inventory and services.
24 Verizon Wireless controls the kiosks and they
25 are solely responsible for hiring, training,

1 managing and terminating the employees who
2 work at kiosks. In effect, the kiosks are
3 manned by Verizon Wireless employees.
4 Verizon Wireless also establishes the
5 pricing, the fees for its equipment and
6 services, and Circuit City has no authority
7 to sell Verizon Wireless equipment either in
8 its stores or on its website. So all the
9 Verizon Wireless inventory is separate and
10 apart from Circuit City and is located in
11 locked storage cages. As Verizon sells its
12 inventory it pays commissions monthly to
13 Circuit City and it also has various charge
14 back rights under this agreement for any
15 services that are disconnected within a
16 certain limited period of time. So I would
17 just like to have confirmation in the order
18 if Mr. Galardi would be so accommodating to
19 confirm that -- make sure that nothing in
20 this priming is impacting or affecting any of
21 the charge back rights that also --
22 recoupment rights that Verizon Wireless has
23 as well as it's clear that it's Verizon
24 Wireless inventory so there can be no liens
25 granted on Verizon Wireless property if

1 either in the DIP or through the Hilco
2 motion, which I'm not sure which one is up.
3 It is very hard to hear, but it is sounds
4 like the DIP order that you are referring to
5 right now.

6 THE COURT: It is the DIP order that
7 we are referring to right now, and I believe
8 Mr. Galardi has already made mention that he
9 doesn't intend to take a lien on any property
10 the debtor does not own. I will have him
11 confirm that now. He's at the podium.

12 MR. GALARDI: Your Honor, we confirm
13 again that we are not taking or granting any
14 liens on any property that is not property of
15 the estate. I would also note, Your Honor,
16 that Verizon has a contract with the company
17 and nothing we are doing is changing the
18 rights of Verizon or any company and to
19 reserve all of our rights and they have all
20 of their rights under the contract. But to
21 the extent they keep it in a locked area and
22 it is not our property, we are not granting
23 any liens in the DIP facility with respect to
24 Verizon property.

25 THE COURT: Ms. Kelbon, were you

1 able to hear that exchange?

2 MS. KELBON: Not really, Your Honor.

3 I'm sorry.

4 THE COURT: Again, it was
5 represented to the Court that the debtor is
6 not taking any interest in any property
7 that's not property of -- is not granting any
8 liens of any not property that's not property
9 of the debtor and to the extent Verizon
10 maintains its own inventory in locked places
11 they are not taking or granting any liens on
12 Verizon property, that they are subject --
13 that there is a contract between Verizon and
14 the debtor and that, you know, controls this
15 and they're reserving all of their rights
16 under the contract.

17 MS. KELBON: That's fine, Your
18 Honor, if we can include something like that
19 in the order as well as that we are rightful
20 and charge backs are protected as well.

21 THE COURT: That would be governed
22 by the contract.

23 MS. KELBON: That is correct, Your
24 Honor. I don't want anything in the priming
25 order to be deemed to be impacted on our

1 rights or --

2 THE COURT: I think we can put a
3 sentence in the order that says it is not
4 impacting your usual rights under the
5 contract.

6 MS. KELBON: Thank you, Your Honor.

7 MR. CARRIGAN: Your Honor, David
8 Carrigan. Again, I apologize for
9 interrupting if there's anyone else that
10 needs to be heard.

11 THE COURT: I don't know but there
12 is nobody else at the podium right at the
13 moment. You may proceed.

14 MR. CARRIGAN: Thank you, Your
15 Honor. Ours is a two party creed. One, is
16 this one of the motions that will be brought
17 on for the final hearing on the next omnibus
18 hearing date?

19 THE COURT: Most certainly this will
20 be entered -- well, the Court's understanding
21 is this will be an interim order because we
22 don't have a committee here that is able to
23 look at any of this and then we'll enter
24 another final.

25 MR. GALARDI: It is a financing

1 order. So you can't get a final order for 15
2 days anyway. Whether it is the omnibus date
3 or we talk about a separate date for final
4 hearing on DIPs, but this is an interim
5 order, Your Honor.

6 THE COURT: Right.

7 MR. CARRIGAN: The reason I asked,
8 Your Honor, is that the interim period is
9 defined as -- I think it is defined as the
10 commencement of the case through December 29,
11 2008. I'm not sure whether that was intended
12 to be that whole period or just until the
13 next hearing, whether it is the final hearing
14 or it proves to be a jury final hearing or
15 whatever. The second inquiry was much along
16 the lines of prior counsel was that with
17 respect to, for example, in this case our
18 interest has been in the 503(b)9 rights and
19 also in the reclamation rights. It is not --
20 the entry of the order providing for the
21 financing is not intended to affect those
22 rights as at least subject to the final
23 hearing if we understand it correctly.

24 MR. GALARDI: I'm actually not sure
25 what the gentleman is asking for with respect

1 to 503(b)9 and with respect to reclamation.

2 MR. CARRIGAN: The inquiry reports
3 in most of these cases is the effect of both
4 prepetition liens and also upon any liens
5 granted post petition upon reclamation rights
6 and that's the inquiry. All we are saying is
7 that whatever it was on the filing date is
8 whatever it is when it is up and finally
9 approved.

10 MR. GALARDI: We agree. Your Honor,
11 again, I think many people are used to cases
12 where the lender has all assets and there is
13 nothing for reclamation claims. So what the
14 gentleman is -- whatever the world was as of
15 the petition date, whether there was anything
16 that their reclamation claims could get a
17 lien for under the secured, we are preserving
18 that. We are not trying to change what the
19 world was on the petition date. Now that I
20 understand the question I know where he's
21 concerned about.

22 THE COURT: All right.

23 MR. CARRIGAN: Thank you. Your
24 Honor, that's what we understood and thank
25 you.

1 THE COURT: Okay. You are welcome.

2 MR. GALARDI: And, Your Honor, Mr.

3 Berman did point out that period, that day,
4 the interim period, but we are seeking an
5 interim period before December 29th and so
6 the order will underline itself. Hopefully
7 we'll have a final order entered and that
8 would be a final hearing when Your Honor
9 schedules that.

10 THE COURT: Very good. Does anybody
11 else wish to be heard in connection with the
12 DIP financing order? All right. It does not
13 appear to be anybody. At this point the
14 Court will accept now your proffer as you
15 have set forth, and with the clarifications
16 that you've made on the record the Court will
17 approve on an interim basis the DIP
18 financing.

19 MR. GALARDI: Your Honor, what we
20 would like to do is -- fortunately we don't
21 need to borrow today. What we would like to
22 do is give Your Honor revisions to the order.
23 We would like it to be entered today so first
24 thing -- we actually can't borrow until
25 Wednesday. We can close on the order and

1 start borrowing as early as Wednesday
2 morning. As I mentioned there is payroll.

3 MR. LUCIAN: Your Honor, John
4 Lucian. We are having difficulty hearing Mr.
5 Galardi's comment.

6 THE COURT: He's asking the order be
7 entered today if at all possible because of
8 their needs to be able to draw on the
9 financing. And the Court will certainly
10 accommodate that as soon as you can get that
11 to me.

12 MR. GALARDI: Thank you, Your Honor.

13 MS. KELBON: Your Honor, we would
14 appreciate if you could circulate it to
15 counsel because we have concerns about it so
16 we can quickly look at it.

17 THE COURT: Well, it is being
18 entered on an interim basis and the need for
19 the company to be able to get this done and
20 get it done within the time, because tomorrow
21 is a holiday, is going to be pressing. So
22 I'm not going to require that counsel
23 circulate it among everybody, submit it to
24 the Court. If for some reason it's something
25 we need to take up that we didn't get in on

1 an interim basis, we will certainly take care
2 of it when we have the next hearing when
3 everyone has had a chance to review it.

4 MR. GALARDI: Thank you, Your Honor.
5 I think it is clear we are not putting any
6 liens on any property that is not property of
7 the estate.

8 THE COURT: If there's anything I
9 heard today is that if you try to do that,
10 then there will certainly be protection
11 afforded.

12 MR. GALARDI: I appreciate it.

13 MR. LUCIAN: John Lucian. We did
14 not catch Mr. Galardi's last statement, but I
15 assume it was along the lines they will not
16 be taking any property that belongs to the
17 debtor.

18 THE COURT: Correct. We have nailed
19 that.

20 MR. LUCIAN: Thank you, Your Honor.

21 MR. GALARDI: I will try to speak up
22 for the people. The next matter is item 19
23 on the agenda, Your Honor, and I will say
24 that the next three matters are put after the
25 financing because I will say they are not the

1 ordinary necessarily first day. Maybe the
2 last one is. Your Honor, the next motion is
3 motion for the debtors to assume the agency
4 agreement that was entered into between Hilco
5 Merchant Resources and Gordon Brothers and to
6 continue to conduct the store closing sales
7 pursuant to that agency agreement and various
8 guidelines. Your Honor, prebankruptcy -- and
9 again, with respect to this Mr. Besanko could
10 testify but also Mr. Duffy because FTI and
11 myself were very much involved in the
12 negotiations of the agreement, prior to the
13 bankruptcy, after we made an announcement on
14 September 29th, I believe, in the SEC, the
15 company was evaluating its leases, its
16 four-wall analysis, FTI conducted that
17 analysis, and it came to a determination that
18 there we're at least 155 store leases that we
19 should try to vacate and sell the inventory
20 because it didn't fit our final business
21 model. Whether they were less profitable
22 stores or in markets that were no longer
23 performing well, we proceeded with that. In
24 the beginning of August or the middle of
25 August we then solicited -- and as many of

1 the people in the courtroom know there are
2 essentially six liquidators that you normally
3 approach with respect to liquidating your
4 inventory and conducting store closing sales.
5 We entered into confidentiality agreements
6 with all six. And all six confidentiality
7 agreements, much to the consternation of each
8 one of them, precluded them from forming a
9 joint venture without our consent. We were,
10 again, hoping to get a lively auction and we
11 got a lot of push back from all of them, and
12 at the end of the day, after much back and
13 forth, all pretty much said they weren't
14 going to bid unless we let them joint
15 venture. We then said we would allow them to
16 joint venture and to submit bids, and indeed
17 the two that actually joint ventured, the
18 Gordon Brothers and Hilco, we were trying to
19 keep apart because we brought them as the two
20 most likely to be able to put competing bids
21 and we were unable to do that, and the other
22 four formed their own joint venture. Your
23 Honor, we were soliciting what was often
24 called an equity bid, a bid where you would
25 take -- because we wanted to get a big pop of

1 liquidity early on with respect to the early
2 part of November when we most needed it. An
3 equity bid is essentially what we were asking
4 for with a sort of 80 percent down, buy the
5 inventory, liquidate the inventory in stores,
6 and at the back end you collect your 20
7 percent book, whatever upside. Because of
8 the market and because of the uncertainty of
9 the market and uncertainty of the Christmas
10 period and also the cost of funds of each of
11 the liquidators themselves have to borrow to
12 pay that 80 percent we got what I would call
13 very disappointing bids with respect to an
14 equity bid. We rejected all of those bids
15 and then went back to the liquidators and
16 asked them to provide us now with a fee deal.
17 A fee deal, as Your Honor probably knows,
18 they act as our agent and give you a straight
19 stake. The concern about that is with all
20 the business in the world who knows how it is
21 that they will be motivated, for how long
22 they are going to be motivated and you're
23 paying the fee and as the sales wind down you
24 might not be getting your money. So we go
25 again, very disappointing proposals with

1 respect to the fee deal. We then said we
2 will try one more time. I guess this is now
3 the method, the de jure of the liquidators,
4 and we got what we call a hybrid bid, which
5 is really the bid we have before us. It
6 essentially says that they will liquidate the
7 inventory but they will not have to put cash
8 up front, so we've got the cost of capital
9 out of it, and instead that they will give us
10 a guarantee that we would get a minimum
11 recovery of -- in this case 72 cents on the
12 cost value of the inventory. As I mentioned
13 before, that is still below our appraised
14 value, and in this market we have got
15 auctions to go very much higher than the
16 value, but in the market currently and in
17 retail in particular the bids are not coming
18 in even at the appraisal level, plus as we
19 heard over and over again, as we tried to
20 push this high as possible, from the
21 liquidators this is after all the inventory
22 in stores which are closing. There are
23 concerns about that. There are concerns
24 about the holiday season. We then negotiated
25 an agency agreement with Hilco and Gordon

1 Brothers over two or three days, again, an
2 agency agreement that contemplated remaining
3 out of bankruptcy. Again, if we could have
4 solved our liquidity problems, that would
5 have been our preference. We negotiated a
6 collateral package for them to secure their
7 fee. The problem in a bankruptcy is we can
8 come in and ask Your Honor to give them an
9 administrative claim for their fees. There
10 were two concerns. One, how do we get
11 assurance that we will get our fee because
12 you can always reject a contract? And how
13 can we make sure that, you know, we are
14 subject to auction? Well, we auctioned their
15 contract. We went to the auction, and
16 eventually the other joint venture just said
17 we are not prepared to outbid. We gave them
18 24 or 12 hours to bid after going back and
19 forth. They decided not to bid. So we were
20 comfortable with the price. The security
21 issue, again with Bank of America's consent,
22 we granted them a second lien on all
23 inventory on all stores. Again, Your Honor,
24 thinking that if we ever got to the
25 subordinated debt these may be the sales that

1 would be done by that point and we would work
2 around it. And Hilco and Gordon Brothers
3 agreed to take that second lien, but more
4 importantly after negotiations they also
5 agreed that upon the assumption of that
6 agreement they will no longer have a second
7 lien, again freeing our inventory from the
8 second lien so we can begin our vendor
9 negotiations and our second lien financing.
10 We also agreed to seek on a first day as fast
11 as possible the assumption of that agreement.
12 It is obviously not our preference to start a
13 store closing sale beforehand and ask Your
14 Honor to approve the procedures. We did in
15 the agency agreement and I will note -- make
16 sure that they agreed to comply with state
17 laws and store closing laws. The biggest
18 issue is leases and the lease clauses. We
19 then proceeded to negotiate with them the
20 deal, and one critical fact that they were
21 willing to do is as we knew that the sale
22 would be approaching we insisted, and they
23 have provided, people to come in and help as
24 we announced the store closing for SEC
25 purposes to make sure that we didn't have

1 sufficient shrink or TVs were there. TVs
2 were in stores. Gordon Brothers and Hilco
3 agreed to meet with us to get people in the
4 stores to make sure to avoid as much shrink
5 as possible. They provided an incentive
6 bonus to the people that are in fact in this
7 store to sell the inventory. Again, it is a
8 very hard decision to tell people that you
9 are going to be laying off people and store
10 closings in this market. And they again
11 agreed to backstop with a letter of credit
12 attestable to our bank group to 72 cents on a
13 dollar. Again, it is an urgency of our
14 agreement as set forth if we get the first 72
15 cents they get the next three and a half
16 percent and then there is a 50/50 sharing of
17 the proceeds. So we do well on the sales.
18 The preliminary results are we are in fact
19 doing very well with the sales, then there is
20 an upside for both the company and Gordon
21 Brothers. So we sort of met the equity idea
22 of get us some upside. We sort of guaranteed
23 an amount but we are getting a fee. It
24 doesn't give us the liquidity profit that we
25 wanted, but nonetheless these sales are

1 expected to go in the five or six week period
2 of time and therefore be done by December.
3 It was also very important for us to begin
4 these sales so that we could, if we need to,
5 do the lease negotiations and possibly reject
6 155 stores by the end of December and
7 therefore incur with little rent with respect
8 to the stores during the bankruptcy period.
9 The reason we put it on for first day, Your
10 Honor, as I mentioned, one of the significant
11 provisions that were negotiated was the
12 security package. From our perspective the
13 sooner that we could assume this agreement
14 the better because we could, one, relieve
15 ourselves of the lien. With respect to the
16 other relief that we seek here, Your Honor,
17 we think it is fairly standard with respect
18 to store closing procedures, and, again, I
19 know there are landlords here. We have
20 preserved the rights of AGs to come in and
21 complain. We have preserved the rights of
22 landlords to come in and complain with
23 respect to the procedures. One of the
24 choices -- and, again, these things are all
25 too common. The landlords know Gordon

1 Brothers, know Hilco. There is much
2 consternation about banners and how big the
3 banners are, whether you can put them by the
4 windows or not. They seem to always get
5 resolved. We know Karen Caudry (Ph) who does
6 represent a lot of the AGs. We think we have
7 in the proposed formal order all of those
8 protections that are required for landlords
9 and for the AGs to police this process. It
10 is a very short process. And obviously
11 Gordon Brothers and Hilco face some risks.
12 If we tail out the assumption, it is very
13 easy to come in and say, well, don't assume
14 it now when all the work is done. In
15 addition, Your Honor, we have provided them
16 with a 1 million dollar up-front deposit,
17 most of the costs to do these things, to buy
18 the signage, and we have worked with them. We
19 gave them that. There is not a lot of money
20 that we know of that was paid on last Friday
21 that we know of that was outstanding. It's
22 not as if this is a large cure here. As I
23 said, we conducted a prebankruptcy auction.
24 We have been told by the other four
25 liquidators that this is the highest and best

1 price we can get into this market. As more
2 retailers come on the market, who knows what
3 you can get in this market. As we get closer
4 to Christmas, Christmas and Black Friday, one
5 of the things we heard from most liquidators
6 is it's better to do this sooner as opposed
7 to waiting for Black Friday because we get
8 ahead of Black Friday sales, and so far the
9 results have been that. We would therefore
10 ask, Your Honor, to approve both the
11 assumption of the agency agreement as well as
12 the store closure procedures. There is
13 counsel here for Hilco and Gordon Brothers.
14 They do have a witness if Your Honor wanted
15 to have that testimony. I think, again, we
16 have Mr. Duffy who can testify, Mr. Besanko
17 as to the process. It is a business judgment
18 matter to assume a contract, to conduct the
19 store closings, whether they are inside the
20 ordinary course or outside the ordinary
21 course. We think we have taken as many steps
22 in the agreement to comply with the state law
23 which is a big concern. We have been very
24 sensitive to advertisement in those matters,
25 plus we have taken enough of the AG's

1 language for their rights to come back and
2 complain and have a process, but we really
3 don't think we are prejudicing either the
4 landlords rights and their contract rights
5 with the leases or the AG's right to complain
6 and generally Hilco and the Gordon Brothers
7 are quite good along with us to resolve those
8 objections to come back before the Court. So
9 we would ask Your Honor to approve the
10 assumption and the agreement and the
11 procedures.

12 THE COURT: Very good. Does any
13 party wish to speak to this motion?

14 MR. POLLACK: Yes, Your Honor. I'll
15 let you deal with anyone first in the
16 courtroom.

17 THE COURT: Okay. Let's take care
18 of the courtroom first and then I will come
19 back to the folks on the phone.

20 MR. LEHANE: Good afternoon, Your
21 Honor. Robert LeHane, Kelley, Drye and
22 Warren on behalf of landlords representing
23 approximately 80 locations. I respect the
24 comments of counsel for the debtor and had a
25 brief conversation with him before the

1 hearing to the effect that landlords would
2 have the rights to come back and ask Your
3 Honor for relief if the proposed GOB
4 guidelines were not sufficient. However, I
5 have had an opportunity now to go through the
6 motion and proposed order and, Your Honor,
7 this is not an interim order not with respect
8 to GOB guidelines.

9 THE COURT: Well, we will make it
10 one and you can have an opportunity to come
11 back, and if there is a problem with the GOB
12 issues you can address those and the Court
13 can take them up.

14 MR. LEHANE: Thank you, Your Honor.
15 I would suggest in the following motion on
16 the calendar, the rejection motion has, I
17 think, precisely the language that would do
18 the trick. It would allow landlords X number
19 of days. We believe 10 is probably
20 appropriate to come in and file an objection.
21 We have worked with Hilco and Gordon Brothers
22 on any number of occasions, but it would be
23 very unusual to make this a final order.
24 With that addition to these -- I also would
25 like to point out, though, that there appears

1 to be two different sets of guidelines
2 attached to the motion. There is a set of
3 guidelines attached to the agency agreement
4 and there is a different set of guidelines
5 attached as an exhibit to the order.

6 THE COURT: The Court reviewed the
7 one that was attached to the order.

8 MR. GALARDI: Your Honor, again, let
9 me address that. To the agency agreement,
10 because we entered into an agency agreement
11 prior to the bankruptcy --

12 THE COURT: It is exactly what I
13 thought.

14 MR. GALARDI: -- there were
15 provisions then to take advantage of the
16 anti-assignment provisions of the Bankruptcy
17 Code. We actually sought approval of
18 different procedures. The one that Your
19 Honor reviewed, the ones attached to the
20 order are the ones that we are seeking
21 approval. Quite honestly, as Mr. LeHane
22 knows, they are more friendly to the sorts of
23 sales and anti-assignment clauses which we
24 couldn't do in the leases prior to the
25 bankruptcy.

1 MR. LEHANE: Thank you, Mr. Galardi.
2 One other point, though, in connection with
3 any GOB sale order such as this which would
4 render lease provisions unenforceable, again,
5 those are entitled to adequate protection.
6 We believe that that adequate protection
7 under these circumstances would include
8 payment of the rent that accrued from the
9 filing date through the end of the sales. We
10 don't believe that's in the order. We would
11 ask that be included in the order. It does
12 look like the agency agreement provides that
13 the liquidator would cover the occupancy
14 expenses.

15 MR. GALARDI: Your Honor, I happen
16 to disagree that landlords are entitled to
17 adequate protection, and I'm sure Mr. Pollack
18 will say the same thing as Mr. LeHane on this
19 topic. Your Honor, we have a provision that
20 we do get reimbursed for the actual cost. If
21 we don't pay those costs or if we have to pay
22 those costs, I understand we are in an
23 accrual state, but my understanding is that
24 even though it is an accrual state it is a
25 503(b) claim and it's paid at the end of the

1 case, not necessarily at the time of this
2 period. So we believe that the landlords are
3 protected. I understand that Mr. LeHane was
4 going to do this. He knows I will probably
5 take a certain view with respect to the
6 accrual state versus billings state. Leaving
7 that aside, I think the simple answer is I
8 don't believe -- I think it could be raised
9 again in 10 days. The 10 days is before the
10 end of the month if they want to make an
11 argument with respect to what we call the
12 subrent, let them raise an objection. It
13 will me give an opportunity to either resolve
14 or do that. Nothing prejudices their right
15 in the motion to go make such a request. Mr.
16 Pollack can make a request, and they both
17 know me well enough to know we generally
18 resolve these types of objections.

19 THE COURT: Very good.

20 MR. POLLACK: Thank you, Your Honor.
21 I will work with counsel for the debtor after
22 the hearing to submit an order that's
23 consistent.

24 THE COURT: So we have a 10 day
25 period which you can file objections. It

1 will be an interim order in the meantime and
2 you can raise both of the issues that you
3 have raised.

4 MR. POLLACK: Thank you very much,
5 Your Honor.

6 THE COURT: All right.

7 MR. VAN ARSDALE: Robert Van Arsdale
8 for U.S. Trustee, Your Honor. We would
9 simply like -- I'm not certain that the 10
10 days that we are just discussing would apply
11 to everybody. We have not yet appointed a
12 committee in this case. I think the
13 committee would like to be able to look at
14 this order before it gets to be a final
15 state.

16 THE COURT: Are you concerned that
17 the committee wouldn't be formed to be able
18 to look at it within the 10 day period?

19 MR. VAN ARSDALE: Your Honor, I
20 anticipate we will have a committee hopefully
21 by this Friday. I know the solicitation went
22 out today and we need to factor through that
23 and they will need some time to actually view
24 it. The hope being that part of the people
25 in the committee may know of some other way

1 that this -- these liquidations sales could
2 take place that would benefit the entire
3 estate.

4 THE COURT: I guess we've got two
5 competing interests as with the landlords if
6 they have an interest in the GOB provisions
7 not being adequate in such they would want to
8 get in more quickly, whereas the committee
9 would need more time to look at it. So we
10 need to have some sort of balance there.

11 MR. VAN ARSDALE: Yes, sir.

12 THE COURT: I think we can do 15
13 days.

14 MR. VAN ARSDALE: That would be
15 adequate for the committee.

16 THE COURT: Okay.

17 MR. GALARDI: Your Honor, if I may
18 address the plan, I'm not quite sure -- look,
19 I have set interim orders for committees on
20 many cases. I'm not quite sure -- and I will
21 let Mr. Athanos talk to this, but I don't
22 know what it is to have an interim approval
23 of an assumption. With respect to the
24 procedures of running the store closing --

25 THE COURT: I was more concerned

1 about GOB.

2 MR. GALARDI: Right. But, again, it
3 is hard to go back and say we are going to
4 unassume the contract. So with respect to
5 the procedures and objections to procedures
6 themselves and how we are conducting them, I
7 have no problem with the committee. If it is
8 with respect to the assumption of the
9 contract, then I would have a problem because
10 we have to assume and go forward over the
11 next two to three weeks in any event. With
12 respect to the committee, I'm assuming we
13 will be completely aligned that we want the
14 most money into this estate. I have no
15 problem with their coming up with comments
16 about, well, the store closing procedures
17 should be even better and make us more money.
18 That I certainly will endorse.

19 THE COURT: Well, I think there are
20 two issues as I understand that we are doing
21 it on an interim basis, and it has to do with
22 raising the GOB terms and also the issue of
23 adequate protection. We are preserving those
24 two issues. I agree with you completely.
25 You know, you can't unassume a contract. If

1 you are assuming it, you are assuming it. So
2 I understand that. That's part of it. And
3 so for clarity I want everyone to know where
4 the Court is coming from.

5 MR. VAN ARSDALE: Your Honor, I was
6 only speaking to the GOB part of this
7 particular order.

8 THE COURT: All right. Very good.
9 We have some other people that want to speak
10 to this.

11 MR. ATHANOS: Good afternoon. Joe
12 Athanos on behalf Hilco and Gordon Brothers.
13 I think we are all on the same page here.
14 The assumption in the existing agreement --
15 what the existing agreement says is Gordon
16 Brothers and Hilco will comply with all laws
17 and Gordon Brothers and Hilco will comply
18 with all leases. That's the best you can do
19 outside of bankruptcy, and we understand
20 that. I have a witness here today who will
21 testify that it is 3 million bucks to the
22 estate if we can do better which you can in
23 the bankruptcy. You can get out of GOB laws,
24 do the supremacy clause, and you can get out
25 of the terms of leases, instead of paying the

1 bank, theaters, and having side walkers and
2 that stuff adding value to the sale, and here
3 we think it is worth 2 or 3 million dollars
4 to the debtor's estate. We think there is a
5 huge benefit there, and we think that ought
6 to be approved. But we understand people
7 need the opportunity to object, and we will
8 work with landlords' counsel, which every
9 single person who is here today on behalf of
10 landlords we have worked with a thousand
11 times and it's very unlikely we will be back
12 in court with respect to any of them. We've
13 worked a very long time. And, in addition,
14 with the AGs, the same issues. We expect to
15 have issues but we will work them out. If we
16 don't, we will come back to the Court and
17 that's fine but not on the original agreement
18 which is going to be assumed and that's it,
19 it is final, but on the new GOB procedures
20 that we are getting by virtue of the case
21 being made.

22 THE COURT: That's what I understand
23 the new GOB, the ones that were attached to
24 the order, not to the original agreement that
25 I will be approving on an interim basis

1 today.

2 MR. ATHANOS: That's fine, Judge.

3 THE COURT: I'm now turning to
4 counsel on the phone to give them an
5 opportunity.

6 Mr. Pollack, is there anything else
7 you want to raise?

8 MR. POLLACK: Well, Your Honor,
9 since Mr. LeHane knows most of my arguments
10 and Mr. Galardi usually reads my mind, there
11 isn't much else. I think Mr. Athanos really
12 hit the nail on the head and that is the
13 issue, the main issue I had was that the GOB
14 contract that they were asking to assume was
15 a prepetition one which didn't have the right
16 to do certain things which now they are going
17 to have in bankruptcy, but having worked with
18 him and Mr. Klotz from Gordon and Mr. Capp
19 (Ph) from Hilco, again, I don't see there is
20 a problem we will have to come back to the
21 Court for. We would just like that
22 opportunity in case something unusual
23 happens.

24 THE COURT: Very good. Thank you.

25 Any other counsel on the phone wish

1 to be heard on this matter?

2 MR. HILLMAN: Yes, Your Honor.

3 David Hillman, counsel for Panasonic
4 Corporation of North America. As I had
5 advised the Court during the discussion over
6 the DIP financing motion Panasonic owns the
7 goods that are in Circuit City's possession.
8 It is my understanding that some of those
9 consigned goods are -- may be in some of the
10 stores that are closing, the 154 stores. The
11 consignment agreement was terminated
12 prebankruptcy. We gave notice to Circuit
13 City, to Hilco and to Gordon Brothers that we
14 did not consent to any sale or disposition of
15 our products at any of these GOB sales. It
16 is not clear to me whether or not that
17 request is being honored, and as I had
18 mentioned we're filing hopefully today, if
19 not tomorrow, the complaint that -- a motion
20 for a TRO and preliminary injunction. So my
21 objection to the motion is I have no problem
22 with approval if the Court approves the
23 motion. My problem lies within selling
24 Panasonic's product at any of those sales.

25 THE COURT: Okay. But which is

1 going to be subject to a separate complaint
2 and TRO which you are going to bring before
3 the Court, and I assume then we'll resolve
4 those issues at that time.

5 MR. GALARDI: Your Honor, we are not
6 in any way prejudicing their rights to bring
7 a complaint, to seek a TRO or to address
8 those issues in the proper form with a
9 complaint, a TRO, and now I understand I may
10 be here a couple days doing so.

11 THE COURT: So, Mr. Hillman, nothing
12 in this order prejudices your right to
13 proceed forward, and the Court will resolve
14 the issues that you raise in the context of
15 the TRO which I will anticipate receiving
16 shortly.

17 MR. HILLMAN: Thank you, Your Honor.

18 THE COURT: Any other?

19 MS. KELBON: Regina Kelbon for
20 Verizon Wireless, Your Honor. Again, I
21 incorporate my comments that I raised in the
22 DIP. Obviously it's Verizon's inventory,
23 can't be sold by Circuit City, have no
24 authority to sell our large inventory that's
25 specially secured in marked cages. I do not

1 believe that is the intention since Verizon
2 was informed of Hilco's presence at the
3 property and we believe our stuff is not
4 included. We would just like confirmation of
5 that that there was no intention of that as
6 part of this Hilco agreement. The agreement
7 is not attached of record so we can't review
8 it to know what the actual contract says. We
9 could not find it on our docket.

10 THE COURT: I assume you've got
11 control over your inventory if it is in a
12 locked location?

13 MS. KELBON: Yes, Your Honor, we do.

14 MR. GALARDI: Mr. Athanos has just
15 confirmed they are not selling any of
16 Verizon's equipment and that's my
17 understanding, and Verizon is free to contact
18 Hilco and remove it if that's what they need
19 to do.

20 MS. KELBON: We are in touch with
21 the Circuit City management and they are
22 discussing the exit dates of the various
23 locations that the Circuit City is closing.
24 So we just reserve all of our rights under
25 our contract, and I'm sure hopefully this

1 will be worked out amicably.

2 THE COURT: Yes. So noted. If you
3 have any problem at all, you can come back to
4 the Court and get relief?

5 MS. KELBON: Thank you, Your Honor.

6 THE COURT: All right. I don't
7 think any other party --

8 MR. BRANCH: Dustin Branch,
9 representing various landlords. I quickly
10 wanted to put an objection on the record. My
11 issue has been pretty much laid out by Mr.
12 LeHane and Mr. Pollack and I've dealt with
13 Gordon Brothers and Mr. Galardi on numerous
14 occasions. But at this point I couldn't
15 really hear too well as far as the timing to
16 bring objections on going out of business
17 sales. Whether it is 10 or 15 days, I just
18 couldn't hear for sure.

19 THE COURT: We are going to address
20 that right now.

21 MR. BRANCH: Thank you, Your Honor.

22 THE COURT: All right. So first the
23 Court will accept the proffer of the
24 testimony of the proffered witnesses in
25 connection with this motion. The Court will

1 approve the assumption of the agreement and
2 then with regard to the GOB provisions and
3 the question of adequate protection of
4 landlords the Court will approve that on an
5 interim basis going forward, and it's been
6 suggested that 10 days notice and then the
7 U.S. Trustee raised a question about 15 for
8 the committee. I'm not really sure that it
9 is a committee issue on either of these two
10 issues that we're reserving. But, Mr.
11 Galardi, I would like your input on the
12 timing and so I would solicit that at this
13 point.

14 MR. GALARDI: Your Honor, again, I
15 have no objection to the landlords having 10
16 days. I have no objection to the committee
17 having 15 days if they have an objection.
18 What I expect of them is to join me in
19 opposition to any landlord objection should
20 they arise. I think there is no problem with
21 the time frame.

22 THE COURT: All right. So it will
23 be 10 days for the landlords, 15 days for the
24 committee. All right. With that then it is
25 approved.

1 MR. GALARDI: Thank you, Your Honor.
2 Your Honor, moving now to item number 20 on
3 the list of motions, this is the debtor's
4 motion. As I described early on in the case,
5 Your Honor, there has been leases that the
6 debtors have vacated the premises. Some are
7 simply barred and some are currently
8 subleased to third parties. We filed a
9 motion last night to reject all of those
10 leases. The carrying costs, as I mentioned
11 as, and Mr. Besanko would testify, is roughly
12 40 million dollars a year. It is critical,
13 especially in this accrual state to get out
14 of those leases as fast as possible because
15 each day we remain in those premises arguably
16 we are accruing post petition administrative
17 expenses. Your Honor, following sort of the
18 Delaware precedent that I actually
19 represented the landlords on, the way in
20 which we have tried to proceed to do this is
21 to give the unequivocal notice that we would
22 be out of the premises, that we don't reserve
23 any rights to go back to the premises. So it
24 is an unequivocal objection. Unfortunately,
25 Your Honor, we don't have a committee here

1 because if there was a committee I would have
2 them agree with us to that.

3 And finally to return the keys to
4 the premises. Your Honor, we have not
5 returned the keys today but we will return
6 them as soon as Your Honor blesses it,
7 because if Your Honor didn't bless the
8 rejection there was no reason to return the
9 keys. We have made arrangements to return
10 the keys tomorrow so that we would reject.
11 So we are actually seeking rejected as of the
12 petition date so we could avoid post petition
13 administrative expenses with respect to the
14 estate. Your Honor, again, this is a
15 business judgment decision. It is actually
16 evidenced by the fact that we have -- as Mr.
17 Besanko will testify, we have not been
18 operating these premises for quite some time.
19 Mr. Besanko will further testify that the
20 sublease rent that we received is less than
21 the rent that was paid. It is a drain on the
22 estate. In addition, Mr. Besanko would
23 testify that at prior times we invited people
24 in to see if they could take the lease
25 portfolio, find the market portfolio. We

1 have been unable to do so. Indeed, as Mr.
2 Rothschild will be able to testify or FTI
3 would be able to testify, one of the problems
4 with the prebankruptcy liquidation sales
5 profit is we have these leases and eventually
6 you have to do something with those. We
7 believe it is the business judgment of the
8 debtors to reject effective immediately. Mr.
9 LeHane will get up, and we don't have a
10 problem with this, but if we don't return the
11 keys within a certain period of time and if
12 we keep occupation of the premises, it's
13 without prejudice of the landlords rights to
14 come back and say, hey, you said you were
15 doing this. You didn't do it. You took the
16 value of the property. We want an
17 administrative claim. We have no objection
18 to that, but I didn't want to see that we had
19 to have the keys today. We would like to get
20 the keys out tonight, and hopefully we can
21 make the FedEx deadline, but no later than
22 Wednesday. If we can have in the order that
23 we return the keys no later than Wednesday,
24 the rejection could be effective as of the
25 petition date.

1 THE COURT: Very good. Does any
2 party wishes to speak to this motion?

3 MR. POLLACK: Yes, Your Honor.
4 David Pollack on the phone. I don't know if
5 there's anyone in the courthouse.

6 THE COURT: Yes. We'll go to the
7 podium first.

8 MR. LEHANE: Thank you, Your Honor.
9 Robert LeHane. Thank you, Mr. Galardi, for
10 attempting to read my mind. We certainly
11 appreciate that this is set up as an interim
12 motion. There is an objection deadline for
13 landlords to object as Mr. Galardi stated,
14 but we don't know whether or not possession
15 of the premises has actually been turned over
16 to the landlords, and we would prefer that
17 the effective date of the rejection of these
18 leases be the later of today or the date that
19 the premises are actually delivered to the
20 landlords by surrender and turnover of the
21 keys. We believe that will avoid a necessity
22 for a multitude of objections whereby maybe
23 landlords get the keys Thursday, Friday or
24 even Wednesday. They have been in the
25 premises post petition. We believe that

1 those landlords are set up with an
2 administrative claim for that time. Thank
3 you, Your Honor.

4 THE COURT: Thank you. All right.
5 I will go to counsel on the phone.

6 MR. POLLACK: Thank you, Your Honor.
7 David Pollack again. Your Honor, I don't
8 have any problem with the date of rejection.
9 I have verified that our premises are vacated
10 and we only have, I believe, one on the list.
11 However, the motion goes further than just
12 rejecting the leases and wants to or ask the
13 Court to approve rejection of guarantees as
14 well. In most cases I have been in
15 guarantees have been held to be non-executory
16 and therefore not capable of rejection under
17 Section 365, and so with regard to guarantees
18 we would ask that that issue not be granted
19 on an interim order because I don't know how
20 you undo a rejection of the guarantee but be
21 held to the final hearing on this and that
22 the interim apply only to the other relief
23 sought by the debtors.

24 THE COURT: All right. Thank you.

25 MR. GALARDI: Your Honor, addressing

1 first Mr. LeHane's point, again, I think we
2 can set a hard date of Wednesday and then we
3 can have disputes. I think we can get all of
4 the keys back. It is just the hearing to
5 give those notice to get it out today and
6 hopefully it's going to be done. So if we
7 can get them back on Wednesday, I would ask
8 the date to be retroactive to the petition
9 date.

10 With respect to Mr. Pollock's issue
11 on the guarantee, I actually agree with Mr.
12 Pollack that it is not in fact an executory
13 contract, but we do it out of an abundance of
14 caution because if it's not an executory
15 contribution, it's prepetition and
16 prepetition breach. It really is much ado
17 about nothing. If it is prepetition
18 contract, we breach it, and if it's an
19 executory contract, we reject it. I don't
20 know what we're reserving it for. So we have
21 no problem saying we would reject it to the
22 extent it is an executory contract and change
23 the language to reflect that, but I don't
24 want to be bound by a guarantee that I
25 believe is -- even if it's not executory, it

1 is a contract I can breach.

2 THE COURT: Very good. Apparently,
3 Mr. Pollack, you win on that. You have a
4 prepetition claim instead of an executory
5 contract. But in any event the Court is
6 going to approve this motion and --

7 MS. KELBON: Your Honor.

8 THE COURT: Yes.

9 MS. KELBON: Excuse me, Your Honor.
10 Regina Kelbon. Your Honor, with respect to
11 this motion, the motion recites that Circuit
12 City is not occupying these premises. I have
13 not had the opportunity to confirm that with
14 the DIP list that is attached to the motion
15 with Verizon Wireless. I'm assuming Circuit
16 City is not in the premises and Verizon
17 Wireless kiosks are not in the premises but I
18 would like to reserve my rights with that
19 just in case there is any disagreement with
20 that because I'm assuming we are out of those
21 premises as well.

22 THE COURT: I'm assuming so, too,
23 since you have all of your inventory locked
24 and secured.

25 MS. KELBON: That is correct, Your

1 Honor. That's why we think that, but since I
2 cannot on this short notice confirm on a
3 store by store basis which was attached to
4 the list, I will have to go with the debtor's
5 representation that they are not occupying
6 the premises to reserve my rights and my
7 contract.

8 THE COURT: Right. If you need
9 relief, if you find out there is something
10 different, you can always come back to the
11 Court and request appropriate relief. So it
12 will be without prejudice to that.

13 MR. GALARDI: And, Your Honor, I
14 would only add that if they are in the
15 premises -- and most are sublessee and we're
16 rejecting all subleases. So it doesn't mean
17 we have to stay there for their sake. They
18 can get their property out. And now they are
19 on notice. Get it out.

20 THE COURT: Exactly. So the Court
21 is going to approve the rejection of these
22 contracts. The Court is going to approve the
23 rejection as of the petition date with the
24 proviso that the keys be returned to the
25 landlords by Wednesday. If that does not

1 occur, then the Court will entertain any
2 landlord motion for relief as may be
3 appropriate at that point. It is also my
4 understanding that the landlords -- even if
5 they don't have the keys, they have the
6 premises now and can re-enter their property.

7 MR. GALARDI: That is correct, Your
8 Honor. Again, the key issue has become a big
9 one. Sometimes you can't find the keys. The
10 landlords have the key. It is a symbolic
11 gesture more than anything else. I want to
12 reserve. I mean, we will try to get everyone
13 their keys on Wednesday. If not, they
14 reserve their rights to seek an
15 administrative claim and say, hi, you didn't
16 give the keys back. I reserve the right
17 saying you have had the occupancy.

18 THE COURT: I understand the issue.
19 That's why I put the additional comments on
20 record, but from the Court's standpoint the
21 landlords have possession immediately and
22 they can enter this evening if they want if
23 they want to get a locksmith and go in
24 themselves. And the keys are going to be
25 returned. And if we have an issue about

1 whether or not you're holding the keys that
2 you actually do have or somehow using the
3 space, then I will take that up at a
4 different time.

5 MR. LEHANE: Thank you, Your Honor.
6 We actually agree with Mr. Galardi's comment.
7 There is just a date that would need to be
8 filled. It's the landlord objection
9 deadline. I would propose the same 10 days
10 that was put in the GOB motion.

11 MR. GALARDI: We agreed to that and
12 the committee 15.

13 THE COURT: Okay. Ten days for the
14 landlords, committee 15.

15 MR. GALARDI: Those are both
16 weekdays. So I think it works out, the 20th
17 and 25th.

18 THE COURT: I would hope so.

19 MR. GALARDI: Thinking about it, I
20 believe they are.

21 THE COURT: Okay.

22 MR. GALARDI: Your Honor, that then
23 brings us to the last motion on the agenda,
24 and, again, Your Honor, all of our relief has
25 been structured to try to reorganize this

1 company. As Your Honor may know we are a
2 public company. For better or worse we have
3 been operating losses as a result of not
4 having great performance over the number of
5 years. That may be a very significant asset
6 for this company. Accordingly, what has now
7 become somewhat common with public companies
8 is to seek relief to limit the trading in the
9 equity security so as to not have a change in
10 control, you know, inadvertent change in
11 control. What we have sought -- and, again,
12 this is clearly an interim order with the
13 committee to come back to it -- is to seek an
14 order from this Court establishing procedures
15 eliminating trading and security during this
16 interim period obviously subject to people's
17 rights to come in and to object to that and
18 the committee's right to object. It is to
19 preserve what may be a very significant asset
20 either for a potential purchaser or for a
21 standalone plan, namely the NOLs that we have
22 at the current time. Again, Mr. Besanko is
23 in the courtroom and could testify as to the
24 size of the NOLs, our ability to use NOLs.
25 Obviously if there is a different outcome,

1 these procedures could be vacated at that
2 time, but right now, hoping to reorganize or
3 to sell and to have that as an asset, we
4 would like to do everything possible to
5 preserve that. These procedures I understand
6 have been granted in cases in this
7 jurisdiction. I know they have been granted
8 in cases in other jurisdictions, and we would
9 ask Your Honor to grant the relief to limit
10 the trading and notices set forth in there
11 with respect to our equity security.

12 THE COURT: Any party wish to be
13 heard on this motion? Okay. The Court has
14 reviewed the motion and I find it entirely in
15 order and will approve it on an interim
16 basis.

17 And, Mr. Galardi, I had one other
18 motion we had to take up, which is a motion
19 to file under seal. Are you going to speak
20 to that?

21 MR. GALARDI: Your Honor, I think I
22 sort of addressed it, but I probably didn't
23 get an order for it. Those are two fee
24 letters that we discussed earlier, and I had
25 had a dialogue with the U.S. Trustee as to

1 whether those should be disclosed. We would
2 ask Your Honor to keep those under seal, as I
3 mentioned, under record. The total amount of
4 the fees with respect to the facility are in
5 the DIP budget. Our DIP budget is actually
6 higher than that. We would say because of
7 pricing issues and other issue what GE or
8 Wells or Bank of America gets is really a
9 confidential business matter. We would ask
10 Your Honor to enter the order, again,
11 allowing us to file those fee letters under
12 seal. We have given it to the U.S. Trustee's
13 Office. We have given it to the Court. If
14 there is someone who has an actual real
15 interest, we understand they can come to the
16 Court and ask for that. We are not trying to
17 say in all circumstances, but indeed we think
18 we need to file as record and disclose
19 confidential business information of those
20 companies and we ask Your Honor to enter that
21 order.

22 THE COURT: Very good. Office of
23 the U.S. Trustee wish to be heard on this
24 issue?

25 MR. VAN ARSDALE: Your Honor, we did

1 have a conversation prior to court, and the
2 resolution of it was as represented to the
3 Court, and I think that that suits fine. And
4 it still leaves it open if someone really
5 wants to know this to come to the Court and
6 ask that it be unsealed.

7 THE COURT: Very good.

8 MR. GALARDI: And clearly, Your
9 Honor, we will give it to the committee. We
10 know the committee will have to get the fee
11 letters and we will give it to the committee.
12 We are not going to make them come and get a
13 motion. It is standard before we have to go
14 to a final hearing.

15 THE COURT: Very good. All right.
16 The Court is going to approve the motion to
17 file the fee letters under seal subject to
18 further order of the Court. All right. At
19 this point I think we have taken up all the
20 motions that you have filed and we probably
21 need now to do scheduling.

22 MR. GALARDI: Right, the six omnibus
23 hearings and how Your Honor would like to
24 proceed with the next hearings. I guess one
25 of the first questions for Your Honor is on

1 preference. If we go back to my sort of
2 significant dates, December 10th is a big
3 date for us, one, with respect to trying to
4 get a motion to extend the time to assume or
5 reject leases and, two, with respect to the
6 366 deadline. That would be one of the
7 dates. I don't know if Your Honor's practice
8 is to have the hearing on a final DIP at the
9 same, the first omnibus or whether you wanted
10 a separate hearing on that. Anything in that
11 pre-December 10th date as a first omnibus
12 will work well for us.

13 THE COURT: Do you think you will
14 need any date in November or are you looking
15 at the first part of December?

16 MR. GALARDI: Well, I know I'm going
17 to get a TRO on it. So I'm looking -- Your
18 Honor, I think if we did it in early December
19 as opposed to -- because Thanksgiving will
20 sort of put everybody in. We have given some
21 10 days. So 10 days from today and 15 days
22 from today is the 20th and 25th. That Friday
23 or Thursday. Your Honor, unless -- I don't
24 think so. I think probably the very first
25 week of December would be a good day that

1 will allow us to give notice.

2 THE COURT: How about Friday, the
3 5th of December?

4 MR. GALARDI: That sounds like a
5 good day. That will give us 15 to 20 days
6 notice for the DIP. Can we put the DIP --

7 THE COURT: Put everything on that
8 date.

9 MR. GALARDI: Okay. Your Honor,
10 again as to practice, how does Your Honor
11 like to handle applications to employ
12 professionals? Does that go on the first
13 omnibus date? How would you like to do that?
14 I don't want to overload the calendar but I
15 know we will have those filed shortly. How
16 would Your Honor like to proceed?

17 THE COURT: Let's put them for the
18 same date.

19 MR. GALARDI: Okay. Thank you.

20 THE COURT: And do you want to do an
21 afternoon hour or do you prefer to do that in
22 the morning? What is best?

23 MR. GALARDI: Your Honor, since that
24 may be a long day, I sort of ask that we
25 maybe get the whole day.

1 THE COURT: You can have the whole
2 day.

3 MR. GALARDI: Starting -- if we are
4 having the whole day, I think many of us will
5 travel in the night before. But even if we
6 started at 10:00 -- knowing my flights from
7 the northeast, we will land at 9:00. If we
8 start at 10:00, that still allow people to
9 come in in the morning from various
10 locations. So starting at 10:00 I think
11 people will have the flexibility to come in
12 that morning.

13 THE COURT: That's fine. We will
14 start at 10:00 and you have the day.

15 MR. GALARDI: Thank you. Working
16 off of that, Your Honor, again if possible to
17 get two days in a month, I would say some
18 period 14 days or longer after that December
19 5th hearing.

20 THE COURT: We can do the 19th. We
21 can do the 22nd. I can do the afternoon of
22 the 23rd.

23 MR. GALARDI: I think my wife
24 doesn't want me here on the 23rd. How about
25 the 22nd? So that gives us a little more

1 than two weeks if that works.

2 THE COURT: Again, I have that
3 entire day. What kind of hour?

4 MR. GALARDI: Why don't we start in
5 the morning on that day, Your Honor, and,
6 again, we will try to balance the calendar.
7 If we think we need a full day, we can
8 contact. But can we do a morning hearing.

9 THE COURT: Yes. We will set it at
10 10:00.

11 MR. GALARDI: Thank you. Now the
12 new year brings with it the deadline. So
13 something close to the 17th, Your Honor,
14 would be good assuming that lawyers leave
15 everything to the last minute. So sometime
16 around December 11th -- I mean, January 11th
17 to the 16th I think will be a helpful hearing
18 because we do have the loan commitment and
19 try to get there. So I don't know what Your
20 Honor's availability is.

21 THE COURT: That week is tight, but
22 I can do the 16th. I can give you all day on
23 the 16th or I can do the 12th.

24 MR. GALARDI: Your Honor, since life
25 is what it is, let's do the January 16th so I

1 can meet that deadline but give myself the
2 full time to that deadline.

3 THE COURT: All right. We will set
4 that at 10:00 as well.

5 MR. GALARDI: Thank you. Just
6 because there might be other matters, Your
7 Honor, if you have anything the last week of
8 December I think as a precaution.

9 THE COURT: We're going to go back
10 to December?

11 MR. GALARDI: I'm sorry, the last
12 week of January. My apologies.

13 THE COURT: Thursday the 29th.

14 MR. GALARDI: That would be fine.

15 THE COURT: I will set that at
16 10:00.

17 MR. GALARDI: Okay. Your Honor, any
18 time in the first two -- second or third
19 week. It looks like the week of the 9th or
20 the week of the 16th of February. Maybe the
21 week of the 9th and then something towards
22 the end of February before my March deadline.

23 THE COURT: The 13th.

24 MR. GALARDI: That would be good.
25 10:00?

1 THE COURT: 10:00.

2 MR. GALARDI: And though we have a
3 March deadline to file a disclosure statement
4 and plan maybe something that first week of
5 -- how many do I have now? One, two, three,
6 four, five. I'm going to ask for one more,
7 maybe the first week of March, Your Honor.

8 THE COURT: March 3rd at 10:00.

9 MR. GALARDI: Make that six. Thank
10 you.

11 THE COURT: Yes. That is six.

12 MR. GALARDI: We would just fill in
13 that, the case management order and file with
14 those dates, correct?

15 THE COURT: That will be fine. And
16 then depending on where we are at that point
17 we can always set other dates beyond that.

18 MR. GALARDI: Yes, thank you. Your
19 Honor, that concludes the matters again from
20 Circuit City and myself. I truly appreciate
21 your doing this on such a short notice and
22 accommodating us and granting relief that I
23 hope sets the company on good footing going
24 forward. Thank you.

25 THE COURT: I certainly wish you

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1 luck with the case.

2 MR. GALARDI: Thank you.

3 THE COURT: We're done.

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CERTIFICATE OF COURT REPORTER

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/s/ Calvin Addison

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EXHIBIT C

1 UNITED STATES BANKRUPTCY COURT
2 For the Eastern District of Virginia
3 Richmond Division
4
5

6 December 5th, 2008
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9 Ch. 11 Circuit City Stores, Inc.
10 08-35653-KRH
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12
13

14 Transcript of testimony and other incidents in the
15 above, when heard on December 5th, 2008, before the
16 Honorable KEVIN R. HUENNEKENS, Judge.
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24 CRANE-SNEAD & ASSOCIATES, INC.
25 4914 Fitzhugh Avenue
Richmond, Virginia 23230
Tel. No. (804) 355-4335



1 APPEARANCES:

2

3 MR. DOUG FOLEY

4 McGuire Woods, LLP

5 901 East Cary Street

6 Richmond, Virginia 23219

7 Counsel for debtors

8

9 MR. GREGG GALARDI

10 Skadden, Arps, Slate, Flom, LLP

11 One Rodney Square

12 PO Box 636

13 Wilmington, DE 19899

14 Counsel for debtors

15

16 MR. BRADFORD ENGLANDER

17 7200 Wisconsin Ave.

18 Suite 800

19 Bethesda, MD 20814

20 Counsel for Alliance Corp. Source Interlink

21 Media, LLC

22

23

24

25

1 MR. BRUCE MATSON
2 951 Byrd St.
3 Richmond, Virginia 23219
4 Counsel for Bank of America
5

6 ROBERT VAN ARSDALE
7 Assistant United States Trustee
8 600 East Main Street Suite 301
9 Richmond, Virginia 23219
10

11 MR. DUSTIN BRANCH
12 2029 Century Park East
13 Suite 2600
14 Los Angeles CA, 90067
15 Counsel for various landlords
16

17 MR. DAVID HILLMAN
18 919 Third Ave.
19 New York, New York 10022
20 Counsel for Panasonic Corp.
21
22
23
24
25

1 MR. JOHN MCJUNKIN and DAVID CARRIGAN

2 1900 K. Street NW

3 Washington, DC 20006

4 Counsel for Bethesda Softworks, LLC

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7 TELEPHONIC APPEARANCE:

8

9 MR. SEAN LEUSIN

10 Counsel for VIWY Limited Partnership

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1 THE CLERK: In the matter of Circuit
2 City Stores, Inc., case number 08-35653, hearing on
3 items one through 33 as the matters for today's
4 docket.

5 MR. FOLEY: Good morning, Your Honor,
6 Doug Foley on behalf of the debtors.

7 First I want to thank the Court for the
8 opportunity for the last hour to try to work out
9 some additional resolutions that are on the agenda,
10 and I believe we have done that.

11 Today with me at Counsel's table is
12 Gregg Galardi from the law firm of Skadden, Arps,
13 Slate, Meagher & Flom. And here from the company
14 today, Your Honor, on the front row is Mr. Jim
15 Marcum, Chief Executive Officer, as well as Bruce
16 Besanko, the Chief Financial Officer for the
17 company, Reggie Hedgepeth, who is the General
18 Counselor for the company. Also we have Chris
19 Crowe, who is Director of Real Estate, who is with
20 the company as well, Your Honor.

21 THE COURT: All right.

22 MR. FOLEY: Your Honor, we did file an
23 amended agenda last night. If Your Honor doesn't
24 have a copy, I would --

25 THE COURT: I do have a copy

1 and I reviewed it.

2 MR. FOLEY: All right. We would
3 essentially like to file that agenda, Your Honor,
4 with a couple of exceptions, some settlements,
5 resolutions.

6 Just to go through starting with
7 item number one, this is a motion to file schedules
8 and statements. Our anticipation is to file next
9 week and give notice to parties by December 19th.
10 So although we ask for the end of the month we
11 anticipate filing this next week. And the motion
12 has not been opposed and we would ask permission to
13 submit an order.

14 THE COURT: That will be granted.

15 MR. FOLEY: Thank you, Your Honor.

16 With respect to items number two,
17 three and four, and seven, these are special
18 employments applications.

19 The first one for our firm is for Counsel
20 for debtors. And also with respect to item number
21 three, application for Kirkland & Ellis to employ as
22 special financing counsel; and also application,
23 number seven, none of those applications have been
24 opposed.

25 We also have, Your Honor, an employment

1 application for Ernst & Young as tax consultants.
2 We would ask the Court -- there has been no
3 objections with respect to those applications and we
4 would ask the Court for permission for those
5 applications.

6 THE COURT: Does any party wish
7 to be heard in connection with the proposed
8 applications?

9 All right. They will be granted.

10 MR. FOLEY: Thank you, Your Honor.

11 With respect to the application of
12 Rothschild as Investment Banker and Financial
13 Advisor, as the agenda reflects, Your Honor, the
14 Committee had until yesterday afternoon to object,
15 we have been working through their issues. And I
16 believe we have agreed on a resolution of their
17 issues. We would like the US Trustee's endorsement
18 on these orders to submit those orders as well.

19 THE COURT: All right.

20 MR. FEINSTEIN: Good morning,
21 Your Honor. I'm Robert Feinstein, Counsel for the
22 Creditor's Committee. We have been working
23 delinquently with Debtor's professionals including
24 directly with Rothschild on modified terms
25 essentially changing, in many cases reducing the

1 proposed structure. It's consistent as part of a
2 whole, Your Honor, but which you will see reflected
3 in a number of pleadings we filed.

4 We are trying to do our best, Your
5 Honor. And you will see a number of positions the
6 Committee is taking. We are trying to reduce the
7 administrative burden to make sure that any dollars
8 that doesn't need to go out the door don't go out
9 the door today. It's somewhat controversial, I
10 guess, but in many cases these are sale tax
11 payments, and employee payments, and so forth. We
12 are obviously in a challenging time and with that in
13 mind, on a number of the applications, including
14 these two professional applications the Committee is
15 the way it is. The specific terms of Rothschild and
16 FDI that we agreed to would be reflected in terms of
17 the order that we are working on. And we would
18 submit those on consent of the Committee and
19 debtors, Your Honor.

20 THE COURT: Very good.

21 Does any other party wish to be heard?

22 All right. Then with the consent of the
23 Committee and the approval of the Office of the US
24 Trustee the Court will approve those applications.

25 MR. FOLEY: Thank you, Your Honor.

1 Item number eight on the agenda is
2 a motion to file certain documents under seal. And
3 if I could just pass over that one for a moment
4 because the underline motion is contested so it was
5 not reflected to deal with those together.

6 Item number nine, Your Honor is the
7 motion to establish compensation procedures, and
8 that motion also is not opposed. But there is one
9 amendment to the procedures and we have spoken with
10 the Office of the US Trustee today before the
11 hearing. And we are going to make an amendment to
12 that one with their endorsement and submit that to
13 Your Honor.

14 THE COURT: Does any party wish to
15 be heard in connection with that motion?

16 All right. The Court will approve
17 that as amended with the endorsement of the Office
18 of the US Trustee.

19 MR. FOLEY: Thank you, Your Honor.

20 With items number ten on the docket,
21 Your Honor, this is a matter involving our motion to
22 procedures, we have resolved one of the objections.
23 We have not resolved the other objection but we are
24 working through that. And for the procedure order
25 we ask that this be adjourn to the December 22nd

1 docket.

2 THE COURT: That will be adjourn.

3 MR. FEINSTEIN: Thank you, Your Honor.

4 And with item number eleven,

5 that motion, Your Honor, and there had been

6 significant objections to that. We are also working

7 with the Committee with respect to that to work

8 through that as well. And we ask that every thing

9 related to matter eleven be adjourn to December

10 22nd.

11 MR. GALARDI: We have been working with the

12 Committee and we understand that they have

13 objections to that. We met with them yesterday and

14 we also have been working very hard with them. We

15 are currently putting it over to December 22nd. We

16 may actually come back on January 16th. I think

17 that is another date we have. I just want to give

18 Your Honor notice of that because we may just simply

19 file a notice say it's further adjourned. Some

20 people in the courtroom know that we may not be done

21 December 22nd. Again, as Mr. Feinstein said we have

22 made a lot of progress with negotiations between

23 ourselves, the Committee, so for now we would like

24 to put it off to December 22nd.

25 THE COURT: All right. That will

1 be adjourn to December 22nd.

2 MR. DUNCAN: Your Honor, if we could be
3 heard on that please?

4 THE COURT: Yes.

5 MR. McJuskin: Your Honor, John
6 McJuskin on behalf of Bethesda Softworks, LLC.

7 THE COURT: Bethesda Softworks?

8 MR. McJUSKIN: Yes, Softworks, LLC.

9 In connection with this matter
10 I would like to raise the motion, my partner who has
11 been working on this matter. If he could be heard?

12 THE COURT: Yes.

13 MR. CARRIGAN: Good morning, Your Honor,
14 Daniel Carrigan.

15 THE COURT: Carrigan?

16 MR. CARRIGAN: Yes, Your Honor.

17 Your Honor, our particular observation on
18 this, what is on the agenda, number 12 on page 9,
19 our response to another motion is listed as an
20 objection to this motion. And I noticed in the
21 Debtor's response, filed the response that our
22 response listed was not addressed. All we are
23 saying is that we believe this should come up at the
24 time the reclamation motion is going to be
25 addressed.

1 Thank you, Your Honor.

2 THE COURT: If we address that today it
3 will certainly be taken up at that time.

4 MR. CARRIGAN: Thank you, Your Honor.

5 MR. FOLEY: One matter we would like to
6 take out of order Your Honor relates to the motion,
7 the 9019 motion of Panasonic, which is item number
8 31 on the agenda. The Committee filed an objection
9 to that settlement. Late last night I believe a
10 settlement had been worked out with respect to that.
11 And counsel to the Committee are here towards that
12 settlement.

13 THE COURT: All right.

14

15 THE COURT: Please identify yourself each
16 time you come to the podium so we have it on the
17 record.

18 MR. FEINSTEIN: Certainly.

19 Robert Feinstein for the Debtor's
20 Committee. Your Honor, the amendment that we made
21 that we reflected in a memorandum form agreement
22 with them and debtor has the attached of a form of a
23 consent order to be submitted. It certainly makes
24 changes.

25 One is to address the treatment of

1 Panasonic claims with respect of merchandise that
2 was sold prepetition. The initial motion and
3 agreement there were to be a payment to Panasonic
4 for that amount. And there was an agreement by
5 Panasonic to sale, both of those provisions are out.
6 So all rights are reserved with respect to
7 prepetition cosignment. There is no obligations on
8 Panasonic's part to sale on credit. They will be
9 selling on CIA terms.

10 But with all other respects the agreement
11 will be respected and the provision in the agreement
12 for the sale of the remaining merchandise that is
13 still in debtor's possession. And the agreement we
14 will submit Your Honor will address all of that.

15 THE COURT: Thank you.

16 Does any other party wish to be heard?

17 MR. SMITH: Good morning, Your Honor, J.R.
18 Smith on behalf of Panasonic. Here with me today is
19 Mr. David Hillman.

20 THE COURT: Thank you.

21 MR. HILLMAN: Good morning, Your
22 Honor. I heard what Mr. Feinstein had to say with
23 regard to settlement agreement. That was accurate.
24 However we did take great pains last night and this
25 morning to memorialize the changes to the settlement

1 agreement and to the order. And to the best of my
2 knowledge there is no dispute or issue with respect
3 to the settlement agreement or the order and we are
4 simply at house keeping phrase for the order to be
5 submitted. So to my knowledge there is no further
6 negotiation and it is just a house keeping matter at
7 this point.

8 THE COURT: Very good. Thank you.

9 MR. HILLMAN: Thank you, Your Honor.

10 MR. FEINSTEIN: That's right, Your Honor.

11 I think I left out one thing, Your Honor, that Mr.
12 Hillman will appreciate me saying. We are in
13 discussions but I don't think it has been formulated
14 or resolved to development program to provide trade
15 support and administrative support for the company.

16 THE COURT: Very good. Thank you.

17 MR. MATSON: Good morning, Your Honor.

18 Bruce Matson here on behalf of Bank of America.

19 This happened very recently. We did have an issue
20 in how this would be resolved. We would like to see
21 the final order. We don't anticipate any issues.
22 Mr. Gelardi assured me that we don't have an issue.
23 We would like to look at the order before it gets
24 enters.

25 MR. FEINSTEIN: Just so Your Honor

1 has some background, we would have needed amendment
2 if it came down to prepetition status. The banks
3 were waiting to see how the Committee reacted. This
4 happened late last night around 11:00 or so.

5 THE COURT: Very good. Thank you.

6 So with the amendments stated on
7 the record the Court will approve that order when it
8 comes in.

9 MR. FOLEY: Thank you, Your Honor.

10 Your Honor, the next two items
11 we would like to take up involve a motion
12 Shopping.com, those are items number eight, which is
13 unimposed and item number 26, which was filed
14 yesterday. Mr. Cohen is here for Shopping.com.

15 THE COURT: Thank you.

16 MR. CONDYLES: Good morning, Your Honor,
17 Michael Condyles on behalf of Shopping.com. I would
18 like to present to the Court Jeff Cohen. We have
19 submitted a motion, it has not yet been entered.
20 And I would ask that he be permitted to speak before
21 the Court.

22 THE COURT: He may.

23 MR. COHEN: Good morning, Your Honor,
24 Jeffrey Cohen on behalf of Shopping.com.

25 Your Honor. I think this should be

1 pretty short. In essence, our motion is a request
2 for adequate insurance (inaudible) and
3 acknowledgement from Debtors and the Court that any
4 postpetition service provided and qualify, and a
5 request to the alternative. I'm not going to go
6 through all of this. I think we can narrow it down.

7 Basically Shopping.com is an online
8 capacity website. It permits the debtors to post
9 advertisements of the sale items on Shopping.com
10 depending on what the debtors pay or intend to pay
11 Shopping.com dictates where their adds would be
12 placed on the site.

13 The higher priority the logo of Circuit
14 City logo will appear next to the sale the link
15 saying price, it will have a logo. When they click
16 on that logo it will go to Circuit City.com and that
17 occurs a fee within Shopping.com.

18 In addition to that Shopping.com
19 in working with the debtors work to optimize the
20 relationship. By doing that the debtors will be
21 struck then to negotiate deals with third party
22 vendors on behalf of it.

23 For example, not many people go
24 directly to Shopping.com. They go to google and
25 they put in a television they would like to see with

1 various sale prices across the internet.

2 Shopping.com will negotiate with google that when
3 that item is searched on google then Shopping.com
4 will have a higher priority towards the top of the
5 first page. And when you go to Shopping.com on
6 google and you go to Shopping.com Circuit City will
7 be highly listed.

8 So Shopping.com encourages cost in
9 negotiation with vendors. And then when a consumer
10 clicks on Shopping.com it results in a charge and
11 Shopping.com then gets reimbursed for that.

12 What we are asking for today is it seems
13 that the debtors have acknowledge at least in part
14 in their objection is that a minimum in order
15 acknowledging postpetition services will
16 characterize that any click by a consumer on
17 Shopping.com that results in the routing of the
18 CircuitCity.com website will qualify as an
19 administrative expense claim.

20 The debtors do say in their
21 objection that they have no objection to that if we
22 can prove that in addition to a transaction -- Your
23 Honor, I believe if you review paragraph 18 in the
24 debtor's objection and has admitted as a part of the
25 admission by the debtor's clear statement that the

1 debtors would be severely prejudiced if Shopping.com
2 terminated the agreement.

3 The debtor's successful
4 reorganization is dependent upon remaining a high
5 level of sales particularly during the holiday
6 season, the internet in particular, and Shopping.com
7 in particular provides crucial avenues by which the
8 debtors may obtain this.

9 Without Shopping.com services the
10 debtors suspect a decline in sales at their on line
11 stores. So I think at a minimum an acknowledgement
12 of postpetition services would qualify as
13 administrative expense claim and of course we heard
14 the debtor's response. I don't believe that would
15 be a disputed issue.

16 Shopping.com now request in addition to
17 that is not the long list of items I mentioned in
18 the motion, we are not going to ask Your Honor today
19 to give us that. I do ask Your Honor, because
20 unlike your typical relationship with a vendor or
21 service provider, since Shopping.com is going out
22 and expending cost on behalf of the estates and
23 issue bills on a 30 days basis. So at the end of
24 the month they will issue a bill by the 15th day of
25 the month then its 30 days terms. It often results

1 in Shopping.com extending resources and sometimes
2 waiting 60 to 90 days of providing 60 to 90 days
3 worth of services before we would know whether
4 payment on that first bill, that first month, will
5 be made on a timely basis.

6 So Shopping.com's request is a
7 deposit, not to different from a treatment of a
8 utility product, as an internet provider. I think
9 you can draw a parallel between the services of
10 Shopping.com and a utility provider.

11 Your Honor, considered a utility deposit
12 provide a two week deposit to provide services for
13 30 days. Shopping.com would make a similar request
14 for a deposit to protect them especially since out
15 of pocket may occur. In addition, Your Honor, that
16 we bill every 30 days with a 30 days notice, go out
17 and pay on behalf of the estate. What I would ask
18 Your Honor to do is to permit Shopping.com to issue
19 a bill every 15 days and maintain a 30 days notice,
20 but this way we are just trying to figure out
21 different avenues of providing Shopping.com with
22 that little bit more of protection and yet
23 maintaining the use of the services for Circuit City
24 through the critical holiday season and in light of
25 electronics through the uptake for this. We want to

1 make sure they can continue to use the services and
2 be permanently listed.

3 THE COURT: Thank you.

4 MR. FOLEY: Your Honor, Doug Foley on
5 behalf of the debtors. We filed our response and we
6 plead out the arguments in the papers that the
7 request for relieve of motion although we appreciate
8 Mr. Cohen backing off some of the request from the
9 motion. But it is still essentially -- they are not
10 seeking 365(B)2 because it is too early for us to do
11 that.

12 If they want to send us bills more often
13 then they are free to send us bills more often as
14 long as we are not obligated to pay them more often.
15 What they have asked for is no different from any
16 other contract party, the third party --
17 Shopping.com with extending cost of credit to
18 provide the service, we don't have that in this
19 case. We are sympathetic to their position. We
20 would ask the Court to deny their motion.

21 THE COURT: What does the contract say
22 about the billing cycle?

23 MR. FOLEY: It is every 30 days I believe.
24 Thirty days for the bill, thirty days to pay.

25 THE COURT: Thank you.

1 Does any other party wish to be heard in
2 connection with this matter?

3 Mr. Cohen, do you wish to reply?

4 MR. COHEN: Your Honor, I'll be
5 brief. Just to address the debtor's points, I
6 believe it's performed in the contract. The
7 contract does not require that we go out and pay
8 third parties providers to risk this we do that at
9 the instruction of CircuitCity.com. Their account
10 manager talks to our account manager and request
11 that we go out and make payments -- we are obligated
12 to perform, we will. We are under no obligation to
13 negotiate third party vendors for higher placements
14 on the website. We do that at the request of the
15 company.

16 THE COURT: With regard to that,
17 what are you asking me to do, isn't that just a
18 matter of business negotiations between you and
19 Circuit City?

20 MR. COHEN: All I'm asking
21 Your Honor to do is to protect us from posting
22 deposit. If Circuit City wants to pay us in advance
23 and say I am willing to pay you to pay them, that's
24 fine too. But I think it's less burdensome on
25 Circuit City to post a two week deposit

1 and then be able to run up credit with us
2 on terms as opposed to us delaying the
3 listing by demanding cash in advance.

4 THE COURT: But isn't that
5 something that you can negotiate directly with
6 Circuit City? That is not something that
7 the Court should impose, is it?

8 MR. COHEN: Your Honor, I believe
9 we can negotiate directly with them and I
10 advised my client of that. I think in these
11 economic times people are looking for a second
12 degree of comfort. They have seen comfort
13 given to others similarly situated creditors.
14 If you look at utility motion, there are nine
15 included, there is a third party vendor who
16 consolidates the utility bills. That vendor
17 does not qualify as utility but is getting a
18 deposit. I think what my client is looking
19 for is the comfort that may go out of pocket
20 that they have something protecting them,
21 that they will in fact get reimbursed. So if
22 they fail to pay a bill they will have a deposit
23 there. We are a unique party involved.
24 We are critical for their online services.
25

1 Your Honor this will impact the debtor's
2 ability to operate on line would be significant. A
3 request for a two week deposit is a \$100,000.00
4 issue in a multi billion dollar case. I think it
5 would be beneficial for the debtor to be willing to
6 post that deposit.

7 THE COURT: Thank you.

8 Is there anything further?

9 MR. COHEN: I appreciate your time.

10 THE COURT: Thank you.

11 The Court will grant the motion for
12 filing documents under seal with regard to the
13 motion for adequate insurance of payment. The Court
14 is going to deny that motion. I'm not going to
15 require a two week deposit. And I think the parties
16 are in agreement that post petition transaction are
17 to administrative expense status and will submit an
18 order to that and will grant that.

19 MR. FOLEY: Thank you.

20 MR. COHEN: Your Honor, may I be
21 excused?

22 THE COURT: You may be excused. Thank
23 you.

24 MR. FOLEY: Your Honor, the next
25 item is number 12.

1 THE COURT: Thank you.

2 MR. GALARDI: Good morning, Your Honor,
3 Gregg Galardi on behalf of the debtors.

4 Your Honor, the next motion is
5 item number 12. We have addressed this on the first
6 day. As I pointed out, Your Honor, on the first day
7 I did point out what I think may be the most
8 controversial, in particular, and as I pointed out,
9 Your Honor, and I will proffer the testimony of Jim
10 Marcum, who is the active CEO and President, and the
11 Committee agrees that we can do this by proffer.
12 They will be free to cross if they so desire.

13 Mr. Marcum is the acting CEO and
14 President of the company and Vice Chairman of the
15 Board. I thought it was important to express his
16 position of why we continue to support our former
17 employees and our request for continuing what we had
18 called (inaudible). But as I pointed out Your
19 Honor, there are two decisions that have been
20 recently rendered by prepetition obligations
21 probably entitled priority and probably not entitled
22 to administrative expenses. As I noted, Your Honor,
23 on the first day we acknowledged that and we still
24 believe for other reasons that these statements are
25 important for Circuit City to make.

1 Mr. Martin, if called as a
2 witness, would advise Your Honor that there
3 were 700 positions that were, in fact, terminated
4 and given notice of terminations, I think it was the
5 Thursday and Friday before we eventually filed our
6 petition for relief in these cases. And each of
7 those employees were notified that they were being
8 terminated. And I know it received wide press
9 coverage here in the Richmond area as well as
10 nationwide. But there were 580 people that were
11 terminated at that point. We believe, Your Honor,
12 that there was roughly 1.1 million dollars a week to
13 be paid to these terminated employees as we went
14 forward and therefore the 60 day period, I believe
15 that it was and Mr. Marcum would confirm that it
16 would be approximately \$8,000,000.00 in payments.

17 Mr. Marcum would also testified that
18 approximately 4.4 have already been paid to those
19 employees. Your Honor, Mr. Marcum would say that
20 the relief would be in the best interest of the
21 company notwithstanding the fact that claims made be
22 only priority or to some extent unsecured on the
23 following basis.

24 If he was called as a witness, he would
25 testify that many of the people were given

1 significant time and effort and in some instances
2 have worked their lives at Circuit City. It was an
3 unfortunate fact that the company had to take but
4 nonetheless the needs of these employees and their
5 wages are still in the best interest and reasonably
6 necessary to the reorganization for these two
7 reasons.

8 First of all, Your Honor, these
9 people are still in the community and are still
10 loyal customers of Circuit City and it is important
11 for us to continue with the customer loyalty and the
12 goodwill of these employees. So therefore it was
13 important to treat them what we believe is right.

14 Importantly, Your Honor, and Mr. Marcum
15 would testify that it is also critical for the
16 morale for the still 30 or 33 thousand people still
17 at Circuit City. In deed, Your Honor, there has
18 been many questions that if Your Honor doesn't
19 understand then Mr. Marcum could testify that there
20 had been many meetings with people who are still
21 employed and still concerned about their own wages
22 and benefits. Termination rights, Your Honor, which
23 Mr. Marcum is familiar with having been in this
24 situation before with the fact that contracts go
25 unforceable and there are benefits and other

1 programs. We don't have a retention program at this
2 company at this point and time.

3 Your Honor, Mr. Marcum would
4 testify that we have limited availability, but
5 nonetheless, Mr. Marcum would still testify that
6 what he thought was in the best interest and what
7 the company determined to be in the best interest
8 was to treat these employees the way they did
9 because of the need to continue to have the 30 some
10 thousand work force in the company, still believes
11 in the company and still believes in the employees,
12 and that they are instrumental and the company
13 achieving the business plan for these companies.
14 And therefore he still believes it is in the best
15 interest notwithstanding the four million that has
16 gone out the door, and notwithstanding the fact that
17 we are still requesting a four million to go out the
18 door because it would have a spill over affect, not
19 only on the customer base, but the customers in the
20 community, and also a negative impact on those
21 employees that are still in the company. And at
22 this critical time and this critical time of the
23 year that making each payment and with these
24 employees, that although it may not be required
25 under the law, that the four million dollars should

1 still be paid.

2 Finally, Your Honor, we would
3 also note that if Mr. Marcum was called to testify
4 that it was somewhat to his nature or accidental
5 nature, that we gave similar notices, as Your Honor
6 knows, with respect to store closing employees, but
7 because they were actually store closing employees,
8 those people are going to be paid essentially the
9 same notice that they fortunately will be able to
10 work out their entire time as store level employees.
11 So it looks like all of those employees would get
12 essentially the equivalent notice, although they
13 were too notified prior to bankruptcy that their job
14 would be terminated. So they continued to work at
15 the store level.

16 Your Honor, again, Mr. Marcum, would
17 further testify that these payments were in the
18 budget that we presented to the Court, that they
19 were negotiated with the lenders, that the lenders
20 understood the company's position and accommodated
21 the company's position.

22 So then, again, Your Honor, Mr. Marcum
23 would testify that he believes it is in the best
24 interest of the company and at this time to make the
25 business plan achievable to continue to make these

1 payments and make the balance of those \$4,000,000.00

2 payments. That would be Mr. Marcum's testimony.

3 THE COURT: Does any party wish
4 to examine Mr. Marcum with regard to the proffer
5 testimony?

6 All right. The Court will accept the
7 proffer.

8 MR. GALARDI: Your Honor, I guess
9 it comes down to some legal argument. Your Honor,
10 the legal argument I think fails us here as the fact
11 that unless Your Honor wants to go against the two
12 opinions that we've seen, there are two clear
13 opinions out there today, which say we gave notice
14 of termination and we are not contesting those
15 facts. We gave notice of termination prior to
16 filing. And those two opinions would say that you
17 terminated there is a prepetition that is priority
18 perhaps, the ten thousand, I think these people got
19 that amount or close to it. So there is another
20 balance that would be an unsecured claim.

21 Again, if you look strictly at the
22 employees that's probably the law. But as the law
23 defines whether it was necessary for the
24 reorganization, Your Honor, we think this Court has
25 the power to authorize their payments.

1 And Mr. Marcum's testimony
2 would be that but I can't put intangible when we get
3 \$4,000,000.00 in benefits, or \$5,000,000.00, the
4 goodwill of these employees, the loyalty of these
5 employees, the dissimilar treatment although for
6 legal grounds that they are not the same as the
7 store level employees to keep these corporate
8 headquarters employees. And then the signal
9 that it sends to the rest of the corporate
10 employees who are being asked during this period,
11 which is a difficult period, to keep their head in
12 the game and to maximize value and to achieve a
13 business plan when it is obvious to them that
14 currently times are bad, the programs they have
15 counted on, the contracts, all of those things as
16 Your Honor knows we cut back significantly, servants
17 payments, those sort of things may not be available
18 even for those employees currently but to send a
19 signal that we are going to do everything for our
20 employees that the Court wants.

21 THE COURT: Thank you.

22 MR. FEINSTEIN: Robert Feinstein
23 with the official creditor's committee. Your Honor,
24 the Committee's objection to this motion was not
25 taken likely. We are sympathetic with the employees

1 and we understand the hardships this might cause
2 them. We appreciate that some of the money has gone
3 to them. So it's not all or nothing at all. But as
4 the representatives of the creditors of this
5 enterprise looking out for all of the constituents,
6 vendors, landlords, the current employees, the 30
7 some odd thousand employees who would be devastated
8 if Circuit City doesn't survive Ch. 11. We felt it
9 necessary to take the position on this and a number
10 of other motions today. It's difficult. It's
11 difficult to understand the consequences of
12 withholding payments to not just employees, but
13 taxing authorities, the landlords, Panasonic, who
14 wanted to get paid nine million.

15 Your Honor, eight million here, nine
16 million here, thirteen million here, pretty soon you
17 are talking about no money. And we live in very
18 uncertain times. As Mr. Cohen said it is a very
19 challenging economic environment. And all one needs
20 to do is read in the newspaper every day to see the
21 kind of challenges that Circuit City is facing, that
22 other retailers are facing, that the vendors and the
23 landlords are facing. Everybody has some real
24 hardship here. We are trying to pull together in a
25 certain effort to make sure that Circuit City

1 remains as a viable enterprise for the thirty some
2 thousand that are still employed and for the benefit
3 of vendors who are looking for a good customer in
4 Circuit City, and for the benefit of the landlord
5 who do not want empty, dark stores.

6 So this is very difficult and it is
7 unfortunate that some people along the way will feel
8 hardship, but it's a shared hardship Your Honor.
9 This is not a step we took lightly. The Committee
10 is comprised not simply of vendors, but some
11 landlords, and PPVC, and a class action on behalf of
12 employers. And all of them unanimously agreed and
13 support the filing of this objection. It is not
14 something, as I said, we did lightly.

15 In terms of the legal argument as Mr.
16 Galardi noted, there is the cases that say these are
17 prepetition claims and consistent with the approach
18 we have taken on all matters before Your Honor
19 today. We are trying to conserve --

20 THE COURT: Well those cases are not
21 binding on this Court --

22 MR. FEINSTEIN: Your Honor, this
23 is a case of first impression. We are asking Your
24 Honor to follow those cases on the law and as a
25 matter of doctrine of necessity. I will

1 certainly make the argument, Your Honor,
2 that it is necessity dealing with the other
3 end, that we not send any money unless we
4 certainly have to in order for the greater
5 good to be pursue. So we are asking Your Honor to
6 deny the motion.

7 THE COURT: If I do deny the
8 motion then certainly the coming into the Court and
9 having to decide the issues and then to litigate
10 those issues and then that is going to distract the
11 company, aren't those things that the Court should
12 take into consideration as well?

13 MR. FEINSTEIN: There are any number of
14 legal issues that could be raised before Your Honor,
15 company management, this is a discreet issue in one
16 of many. I don't know if it is typically burdensome
17 for the company to have to deal with this issue. If
18 Your Honor follows this it would end up priority
19 unsecured claims so will be treated in the order of
20 the bankruptcy code of their case. I don't know if
21 there is really much more than a discreet legal
22 issue for a lawyer to address and for Your Honor to
23 decide.

24 THE COURT: Thank you.

25 Does any other party wish to be heard in

1 opposition to the motion?

2 MR. GALARDI: Your Honor, there
3 is the distraction argument. I also note that those
4 cases may technically apply on legal principals,
5 those were liquidated cases, and one of the things
6 we considered and that is why we looked to Mr.
7 Marcum testify by my proffer is that we were
8 actually looking to what affect this would have on
9 the current employees and that is why we are
10 relying to a large extent of the doctrine of
11 necessity.

12 Your Honor points to another
13 aspect of this. You are absolutely right, there is
14 time and distraction. There is with any prepetition
15 claim but the reason those cases got brought was
16 because as soon as you didn't pay this you have
17 class actions in the first days of the case.

18 Again, based on all of these
19 things in consideration of making decisions, they
20 made the decision, that is to make sure when you are
21 letting a person go out of this company, this was a
22 major layoff as Your Honor knows. It was 500 people
23 at the corporate headquarters right here. So all of
24 those consideration, although maybe not legally
25 technical and that is what the doctrine

1 of necessity goes to it is reasonably necessary to
2 affect a reorganization. We are not liquidating
3 right now. We are not hopping to ever liquidate
4 right now. You will see when we get to the landlord
5 matters we are already trying to and I think the
6 Committee is to reorganize. With that as the
7 motivation, I think there is legal authority under
8 105 even if Your Honor wanted to follow the strict
9 reading of the two other cases to still authorize
10 the relief. There is plenty of relief we have done
11 first day, that is not stricken within the
12 bankruptcy code. The question is the reasonable
13 necessary to reorganization and the company's
14 position is this is reasonably necessary
15 to have this company to have a opportunity to
16 reorganize and we ask that you grant that.

17 THE COURT: Thank you.

18 Does any other party wish to
19 be heard?

20 All right. The Court has read
21 the paper that has been filed and with the
22 testimony that has been offered today in the
23 argument of Counsel. The COurt agrees with the
24 company to exercise its business judgement.
25 I think it would be disruptive. I'm not going to

1 rule today on whether claims entitled to
2 administrative expense status, that remains an open
3 issue and one that weighs heavily on the Court in
4 making this decision. I think that given the
5 testimony, the proffer testimony, would indicate a
6 large number of people remain in the community and
7 would need the company for its existing employee's
8 morale that the Court will approve the motion and
9 overrule the objection of the Committee. I did not
10 take the Committee's objection lightly. And I think
11 it is a very strong argument. I think in this case
12 that the motion should be granted.

13 MR. GALARDI: Thank you, Your Honor.

14 Your Honor, I would ask permission
15 that Mr. Marcum be excused so he may go back to the
16 company?

17 THE COURT: Yes.

18 MR. GALARDI: Thank you, Your Honor.

19 Your Honor, with respect to the next
20 motion on the agenda, I think I will be dealing with
21 the rest of them.

22 Matter number 13 on the agenda
23 is again one of the first day motions that the
24 Committee has looked seriously too. It is the
25 motion to pay sales, use, trust fund, and other

1 taxes. There were multiple bases for these
2 payments. Your Honor, we filed an amendment, or an
3 amended motion to seek payments I think an
4 additional \$10,000,000.00 payments. What I believe
5 we have agreed to with the Committee and again we
6 are not saying things we don't believe in and the
7 Committee has raised a very valid objection to the
8 payment of sales, use and other taxes. We have been
9 working on many things. We have not been able to
10 provide them with all of the information with
11 respect to these amended taxes. What we have agreed
12 to do is have an agreement, and whether we are going
13 to do it as a separate order or otherwise, where we
14 will not pay these sales, use and other taxes until
15 we give the Committee the information and whether
16 there are Trust Fund, taxes, or other reasons until
17 the Committee agrees that we can pay those.

18 And should we have a dispute
19 then we will come back on the 22nd with respect to
20 any disputes. We hope not to have any issues with
21 that. But we would like to be able to convince the
22 Committee either that their trust fund, taxes, or
23 some other reason that they should pay because I
24 don't think the Committee wants -- trust fund taxes
25 are not property of the estate. So what we have

1 agreed to do is give them five days notice of that
2 kind of information and if there is an objection to
3 that in that five days then we would not pay it. If
4 there is no objection then we would be authorized to
5 pay it and that is how we will deal with any money.
6 And I'm not going to just limit it to the
7 supplemental, to the extent if there is any money
8 from the original budget, or with respect to
9 additional money we will apply with that procedure.
10 And I think Mr. Feinstein is okay with that
11 procedure.

12 THE COURT: All right.

13 Mr. Feinstein.

14 MR. FEINSTEIN: Yes, Your Honor, I can
15 confirm that we are okay with that procedure as with
16 a number of these matters we are trying to work out.
17 I do want to just signal that the position we
18 continue to take is that if these are
19 demonstratively trust fund taxes, not just property
20 of the estate, it would be appropriate for the
21 debtor to obtain them. But if it's any other kind
22 of nontrustfund payment of prepetition claim then
23 we are going to oppose it.

24 THE COURT: Very good. So that will be
25 approved as modified.

1 I think Mr. Stein wants to --

2 MR. STEIN: Richard Stein on
3 behalf of the Internal Revenue Services, Your Honor.
4 I am at a little bit at a lost on this one because
5 when I read it, and what has been described here
6 today seems to be a little bit different than at
7 least my reading of it, and it won't be the first
8 time that I'm wrong. But I have a great problem if
9 the company intends on not paying over on the 941
10 taxes, certainly the trust fund portion as well as
11 the corporate payment of the 941 taxes. So to the
12 extent that it doesn't deal with each time there is
13 a salary payment made to any employee the company
14 pays into the federal government or to the
15 depository account payments. If they are going to
16 continue to do that I have no problem, otherwise I
17 have a great deal of problem with any kind of order
18 that would authorize the nonpayment of taxes.

19 THE COURT: This order doesn't authorize
20 the nonpayment of taxes. The order that I
21 previously entered authorized the debtor to pay
22 these type of taxes and now with it being modified,
23 it is only that the debtor is going to give five
24 days notice to the committee before they make a
25 payment. And then if the Committee objects to it

1 then you would have to discuss it with the Committee
2 and if nobody agreed then we can come back and I can
3 make a ruling. But right now I am not authorizing a
4 nonpayment of anything.

5 MR. STEIN: Thank you. I apologize.

6 THE COURT: You make a good point.

7 MR. STEIN: Thank you.

8 MR. GALARDI: Your Honor, we
9 understood it as just the authorization you gave us
10 is subject to Committee approval on those matters,
11 and the Committee was clear on its position.

12 Your Honor, that then takes us to
13 matter 14.

14 THE COURT: For the record, Mr.
15 Galardi, I will approve that with the amended that
16 you described.

17 MR. GALARDI: And, Your Honor, I think
18 the Committee as we anticipate I think it will
19 probably be more affective in going back and
20 modifying what Your Honor has already entered. We
21 have had a proposed stipulation that we addressed,
22 you will see the Committee has certain concerns
23 before we take certain actions. I would add this
24 one to that order. Hopefully we will be submitting
25 under separate covers Your Honor an order saying

1 here is how the Committee and the Debtors are going
2 to go forward with any of what I call the bankruptcy
3 prepetition relief. We are working on that order
4 but we just don't have it today.

5 THE COURT: All right. Very good.

6 MR. GALARDI: Your Honor, the next
7 one on the agenda is matter number 14, which is the
8 Debtor's motion for utility services procedures.

9 Your Honor may recall we did
10 this the first day and I guess Mr. Johnson was the
11 one who had raised concern about that. We have
12 since carved out a number of other entries. I
13 believe that this motion is fully resolved although
14 I see right there.

15 The first change, Your Honor, is we
16 have spoken about a block account after going back
17 and forth many times about block accounts, a
18 separate escrow. Essentially what will happen is
19 the bank will set up a reserve that we do not have
20 access to that funds. It just makes it easier like
21 most reserves. And then if somebody makes the
22 request that reserve will be subject to the
23 availability and we will let the Court know of the
24 availability. That was one of the first
25 clarifications we wanted to make to the order.

1 And, in addition, you will see
2 the notice of appeal date on the procedure, we are
3 trying to work out stipulations with all of those
4 parties either by way of paying them, I think we
5 have stipulated that this order does not apply to
6 them very much like Mr. Johnson. It doesn't apply
7 to them so we have with respect to that stipulation
8 and there are others that are listed.

9 In addition, Your Honor, we
10 said in our relief we have negotiated, renegotiated
11 settlements with most if not all of the utilities.
12 I don't think that anyone is still out there that is
13 objecting, I have one adjourn that I know of. We
14 are evaluating the pay in advance or give them a
15 deposit. And then one of things we have talked
16 about, Your Honor, one of the things that will
17 happen in the next hearing or for the final hearing
18 that five million reserve, that two week reserve,
19 will be adjusted accordingly since Mr. Johnson
20 represents every utility I can think of, that
21 reserve will become much smaller. We have resolved
22 his objections.

23 I think then we have resolved
24 all of the objections to this motion that the order
25 can stand with that one modification to the order

1 that says instead of a block account it would be a
2 reserve established by the bank. And we would say
3 this is a final order today. I think we have no
4 parties contesting or asking for any other adequate
5 insurance.

6 The one party is accent energy
7 that ask that this motion with respect to it be
8 adjourn over to December 22nd. So we would
9 essentially carve them out from this, it will not
10 apply to them as a utility, but the same procedure
11 would apply to them if we resolve it or contest it
12 on December 22nd.

13 THE COURT: Does any other party
14 wish to be heard with respect to the utility motion?

15 MR. MATSON: Yes, Your Honor.

16 THE COURT: Mr. Matson.

17 MR. MATSON: Good morning, Your Honor,
18 Bruce Matson again for Bank of America. I don't
19 think we have any issues at all. We just want to
20 seek final order. There were some protections in
21 the first order related to banks but I don't think
22 it's going to be an issue.

23 MR. GALARDI: We are working on that
24 language with Mr. Matson.

25 THE COURT: So then the motion

1 of Accent Energy will be carried over to the next
2 date.

3 MR. GALARDI: Yes.

4 THE COURT: Are you going to
5 be submitting a new order then?

6 MR. GALARDI: I think we will have to
7 submit an amended, whether we call it final order,
8 final utility order, but it will have the language
9 we need to have.

10 THE COURT: All right. The Court
11 will look for that.

12 MR. GALARDI: Thank you, Your Honor.

13 Your Honor, the next matter on
14 the agenda is matter 15. And, again, it is first
15 day relief. The Committee filed a limited
16 objection. It goes to the stipulation we are
17 working on. It is an explanation of what has been
18 up to date, what has not been up to date, and then
19 the notice provision. I think that resolves the
20 Committee's objection. It wouldn't have to be
21 revision to this order, rather it will be superseded
22 by our stipulation. And there were no other
23 objections.

24 THE COURT: Very good.

25 MR. GALARDI: The next matter is 16.

1 It is the first day motion with respect to
2 contractors and satisfaction of liens. Again, we
3 have agreed the same thing that it will be part of
4 the Committee's stipulation there will be a
5 reporting mechanism, a explanation mechanism, that
6 we are working out language. So this order is
7 final, separate order between the Committee and the
8 Debtors.

9 THE COURT: All right. That's approved.

10 MR. GALARDI: Similarly with respect to
11 number 17 on the agenda, that is the motion of the
12 debtor to pay certain foreign vendors and service
13 providers, similar objection by the Committee,
14 similar response. We will add a stipulation of the
15 debtor.

16 THE COURT: That will be approved.

17 MR. GALARDI: Your Honor, the
18 next matter on the agenda is the motion for granting
19 administrative expenses and postpetition delivery of
20 goods, the matter of establishing procedures for
21 reclamation.

22 Your Honor, we received three
23 objections. One was Warner Home Video; the other
24 was Alliance Entertainment and then finally
25 Lumisource filed an objection. I think we have

1 resolved those with all clarification to language
2 that we can put it in the order to be circulated to
3 counsel. I don't know if there was any other
4 objections. I think they have all been resolved by
5 language we worked out to clarify. We are not
6 trying to prejudice anybody rights. We are not
7 trying to limit their rights.

8 THE COURT: Does any part wish to
9 be heard in connection with this motion?

10 MR. ENGLANDER: Good morning, Your
11 Honor, Brad Englander. Our concern, I think the
12 language the debtor propose, I think it needs to go
13 just a step further. I think what the order does is
14 it picks pieces of the language. What the language
15 does is it picks pieces of 546(H). One of the
16 provisions of this -- I'm sorry. I see now that the
17 language has been added. Thank you.

18 THE COURT: All right. Very good.

19 MR. CARRIGAN: Daniel Carrigan,
20 Your Honor, with Bethesda Software, LLC. Your
21 Honor, we filed a response. Our response went
22 beyond the issue that has been addressed under
23 546(H), although that was part of our response
24 as well. Our response is more global and that the
25 debtor has now taken the position that reclamation

1 creditors have a general unsecured claim for the
2 goods and so forth. This is all back to the value
3 that has been argued throughout the northeast, New
4 York, Delaware, and else where. And I am not sure
5 if that is what is before the Court today, although
6 I am prepared to address it if the Court would like.

7 THE COURT: As I understand it
8 nothing is being called along those lines on a
9 substantive basis based on this motion.

10 MR. GALARDI: You are absolutely correct,
11 Your Honor. We have not and I want it to be clear
12 that the reclamation claims, that work with the
13 prepetition security interest, and there is no value
14 -- we are not making that argument. We have not
15 made that argument. We have not made a
16 representation or inclination to make such a
17 representation. What our procedures essentially is
18 that you have the right to go and exercise your
19 reclamation rights as a secured creditor, we are not
20 limiting it.

21 MR. CARRIGAN: With all do respect, Your
22 Honor, that is not the case.

23 THE COURT: Show me what it is that --

24 MR. CARRIGAN: If Your Honor would
25 turn to the motion that was filed. The debtors took

1 the paragraph from the previous page. The debtors
2 submit that the reclamation claims are not entitled
3 to administrative expense with respect to any of
4 reclamation claim, but instead are general
5 nonpriority unsecured claims subject to the debtors
6 rights to object to such unsecured claims on any
7 ground the governing law permits.

8 THE COURT: That's in the motion.

9 MR. CARRIGAN: It is in the motion.

10 However, Your Honor, it is also in the
11 reply that was filed last night. And it's that
12 reclamation creditors are not entitled to adequate
13 protection. However if the Court would turn its
14 attention to the response. I'm sorry I don't have
15 the docket number.

16 THE COURT: I have it in front of me.

17 What page is it?

18 MR. CARRIGAN: It doesn't have a page
19 number, paragraph 13.

20 THE COURT: All right.

21 MR. CARRIGAN: Your Honor, the cases
22 that are cited, they are all the same. These are
23 the cases. Obviously the debtor did take in
24 position these claims are not entitled to any
25 treatment other than a general unsecured claim.

1 THE COURT: You expected them to
2 take that --

3 MR. CARRIGAN: I would expect that.

4 THE COURT: But that is not what we are
5 adjudicating in the motion. All we are doing is
6 establishing procedure as I understand it.

7 MR. CARRIGAN: But the procedures have
8 substantive affect, Your Honor. As Counsel
9 acknowledged at the original hearing is that the
10 current 546(B) remedy is strictly returned goods,
11 and they are being sold even as we speak. So that
12 when we get 120 days down the road is there going to
13 be anything to reclaim, the good will all be sold
14 thorough.

15 What we asked for in our motion,
16 what we suggested in our motion, is the kind of
17 motion that has been entered in Winn Dixie. It's
18 been entered in other cases up in New York, that
19 would basically say that if the debtor is going to
20 get a holiday on responding to and dealing with
21 reclamation claims but not have to address them in
22 the interim, then the catch at the time should not
23 adversely affect the rights, things that happened
24 because the reclamation creditors are not able to
25 get their goods back. That is because the goods are

1 sold or as the structure of this motion had before
2 that the debtor could return goods after 120 days or
3 at some point without the creditor's consent, which
4 has been changed and is now clarified. There would
5 be nothing to get back except that which the debtor
6 no longer wants, those that are broken, or those
7 that didn't sell. We are in the peak season. The
8 goods are being sold through.

9 By the time we ever get around to a
10 resolution anything worth having is already going to
11 be sold. So this procedure motion has substantive
12 impact. The debtor also ask in here, I believe, for
13 clarification that the automatic stay applies here.

14 Now the citations that are in the
15 records, the parentheticals that we suggested that
16 it is only self help. But the breath of the
17 commentary, or the argument, is that any kind
18 because what they want or what they say they want,
19 they don't want distraction in the company.

20 This goes back to the fundamental
21 remedy that we have under reclamation. The remedy
22 of the reclamation is that the notice is given and
23 what typically would happen outside bankruptcy would
24 be that the reclamation creditor, reclamation
25 claimant, whatever the designation, would file a

1 lawsuit to try to obtain reclamation. They would
2 seek a temporary restraining order requiring them to
3 recover the goods.

4 Now during that process and this is all
5 outline actually in cases that is referenced in this
6 reply. If the Court would refer to (inaudible),
7 that case is based on another case, it is based on
8 an older case called Westwood Bank. What Westwood
9 Bank said is that were eliminating reclamation is
10 foreclosure by the secured creditor and use of that
11 foreclosure sale to pay down a secured debt.

12 And what the debtor is concerned
13 about and perhaps justifiably we don't even know how
14 many total reclamation claims there are in this
15 case. In Winn Dixie there is plenty. We knew how
16 many there were. There was a process. There was
17 disclosure. There was at least you knew what was
18 going on, what was happening with the reclamation
19 claim. There is no disclosure provided for here.

20 The order is issued to the substantive
21 rights also has no governing procedures, or
22 standards, or anything else with respect to when the
23 debtor will or will not honor a reclamation claim.
24 There is a provision that they give or sell with a
25 reclamation -- they can either pay him or give the

1 goods back. Well who monitors that. Who approves
2 that. How does the reclamation creditors know that
3 they are being treated the same across the board.

4 We suggested in our response is
5 a one side fits all program. It is also a situation
6 that if the debtor really believes that these claims
7 are valueless under standards, and what those cases
8 do is they take and proxy a foreclosure and use the
9 proceeds to pay down the secured debt. The proxy
10 for that is a quote evaluation, much like under 506,
11 a secured claim or not a secured claim.

12 So the assumption is that if you
13 go through every single claim, or every single
14 reclamation that the lender's lien is always going
15 to be greater -- pay down the unsecured debt. But
16 is that realistic. Is that practical. Is that what
17 happens in the economy. No, it hardly ever happens
18 today. It only happens like that in liquidation
19 sales.

20 And that is our concern, Judge.
21 When we get to the end of this process unless there
22 is some kind of stay of affect of these procedures
23 we are not going to know what is happening with
24 those reclamation creditors. That they could pay
25 for whatever reason, and not even have to bring it

1 to the Court for disclosure.

2 And, Your Honor, in the other
3 cases that we and counsel for the Committee and also
4 for some of the cases in Delaware at least it was a
5 process where they would have a reclamation report
6 which would identify all of the claims, which would
7 identify those that have essentially reduced various
8 reclamation claims whether it's a notice or what has
9 happened in most of those cases is you get to the
10 end of that whole process, you spent a lot of time
11 and a lot of money evaluate in looking for these
12 things. Now we are going to go through this
13 exercise over the next three or three and a half
14 months and we are going to come to an end and we are
15 going to have evaluate -- what is the point in
16 spending the money, the creditors committee are
17 concerned about, and the vendors are concerned
18 about, that everybody is concerned about, what is
19 the point of that exercise. Yes, there needs to be
20 a process. There is no question about it. And we
21 suggested a process in our response. But our
22 concern is that the process, the so called process
23 is going to affect substantive rights, and that it
24 could if it's abused, if manipulated where you go
25 outside of the rules, and frankly most of the cases

1 today it's not unusual. It has turned the rules up
2 side down.

3 The Mating (phonetically) case years ago
4 was all about the confirmation of the plan and then
5 you pay in the order of priority. Well we have
6 these cases today, these great big cases, is that
7 almost everybody gets paid at the front end
8 including for example, with respect to 503(B)9.
9 Those claims have a second priority after the cost
10 and expenses of administration of Ch. 11 case. Now
11 the Ch. 11 process and administration is being paid
12 on an out going basis. And we did not object to the
13 employee's motion. We do not want the employees to
14 be adversely affected, nor the former employees. So
15 we don't have any objections to that. But frankly
16 they are behind us on the 503(B)9 plan and they are
17 getting paid. And various taxes are behind us and
18 are getting paid. And these foreign vendors are
19 getting paid and they are behind us. And the
20 vendors who products are generating money for the
21 debtors operation right now, or at least some of it,
22 are the ones that are having to stand still and wait
23 for a period of time and may never get the claims
24 backs. The debtor comes back in 120 days and say
25 sorry we don't have that any more, or here is what

1 we have left, you can have it.

2 Respectfully, Your Honor, the
3 procedure drives substantive results. And that is the
4 problem with the motion and the process of the
5 structure right now.

6 THE COURT: Isn't that what you have as an
7 administrative expense claim?

8 MR. CARRIGAN: Your Honor, the 503(B)9 is
9 the administrative expense claim, but there is no
10 time to specify to when it paid. But what it does
11 say is that it is senior to most of the other
12 priority claims that are already being paid.

13 And that is the point how can he justify
14 jumping off the entire train, if you will, of the
15 absolute priority rule that if you don't pay
16 prepetition claim, confirmation, when you get off
17 that rule and it may be a problem with the
18 legislature more so, because you are here on the
19 first day and you are here three weeks later and the
20 answer is that this is the very same situation. The
21 economy is dreadful. You've got hundreds if not
22 thousands of people who depend on this company for
23 their jobs. But let's remember and as pointed out
24 in the declaration, there are hundreds if not
25 thousands of vendors who are dependent upon this

1 company. A two million or \$5,000,000.00 account
2 receivable for these people can be just as dramatic
3 if unpaid -- have just a dramatic affect upon other
4 companies.

5 So the trickle down affect, if
6 you will, described is very much equitable to the
7 vendors that are out there. And the fact is I don't
8 think there is any dispute. Although, again, the
9 debtors haven't told us how many reclamation -- in
10 Winn Dixie the debtors told us and they estimated
11 the amounts that would come in and the numbers were
12 known at some point at least. And you could say
13 yes, it's a very large number and if the debtor had
14 to pay all of that money right now, the vendors
15 understand that. On the other hand -- it's one
16 thing that they understand it and is working with
17 the debtor, it's a whole different thing to say as
18 time goes by we will work with you, but trust us.
19 And then at the end the goods are all gone.

20 There has been too many cases, and if I
21 remember the numbers correctly and Counsel can
22 correct me, there are hundreds of millions
23 reclamation claims made, and of course those are not
24 all valid. But that number is going to come down
25 because they are just overstated. But there are

1 hundreds of millions claims made. In Flemming I can
2 say that when we got to the final numbers that came
3 out of the debtor's reclamation point, it had gone
4 from hundreds of millions down to about a twenty
5 million, and part of that was because the stuff has
6 been sold through. And it wasn't there any more and
7 we couldn't claim it. And because there was no say
8 in the process the argument was that what was a
9 couple hundred of million dollars is now a twenty
10 million claim, and by the way that was valueless
11 because the value of the inventory was not greater
12 than the amount of the secured debt. We are not
13 fighting with the secured creditors here. We are
14 not really trying to fight the debtors. What we are
15 saying is don't limit our rights under the
16 procedures.

17 THE COURT: All right.

18 MR. CARRIGAN: Thank you, Your Honor.

19 MR. GALARDI: Your Honor, I never had a
20 procedure objected to like this, so I would do what
21 I did with the utilities, I would carve him out
22 because these procedures do not apply to him.

23 MR. CARRIGAN: Your Honor, we did
24 not ask to be carved out. We asked for a fair and
25 equitable procedure. If Counsel wishes to

1 carve us out then Counsel should give us a
2 fair and equitable procedure. If Counsel
3 does not wish to do that then the Court
4 will really have to rule up or down on it.

5 THE COURT: You are not
6 bound by the procedures under procedural
7 order then you have all of the rights that
8 you had coming in and nothing has been
9 compromised today and you can proceed by
10 motion or whatever you want this Court to
11 grant you.

12 MR. CARRIGAN: Your Honor,
13 superficially I would say that is right. But
14 as a practical matter what is going to happen, our
15 client has a three and half million dollar claim.
16 And, again, Your Honor, we didn't ask to be carved
17 out, what we say to the Court is the problem with
18 this order is it's unfair. It has a subitive
19 impact and --

20 THE COURT: But if it's not
21 impacting you how --

22 MR. CARRIGAN: It does impact us,
23 Your Honor.

24 THE COURT: You are not a part of it.

25 MR. CARRIGAN: Your Honor, this

1 would be like if the debtor came to you and said we
2 have a motion that we are going to apply to a whole
3 class of creditors except this one. Now that is
4 obviously discriminatory.

5 THE COURT: I don't understand.
6 If you want to be excepted from the order then you
7 can, if you want to be a part of the order you can.
8 So it's not discriminatory. You can pick which way
9 you want to go.

10 MR. CARRIGAN: It's not quite the
11 picking, Your Honor. And, frankly, let's examine
12 what would happen if we were on our own. If we were
13 on our own then we would have the right to go in and
14 file a reclamation claim with this Court. We would
15 then have to go through the preliminary injunction
16 and the process. And then the bank for three
17 million or two million, or whatever is left, they
18 could foreclose upon us and use the money to pay
19 down. While every hundred perhaps, or how many
20 other reclamations are out there are going to be
21 sitting there and hoping that one day the debtor --
22 we are at a loss if we are all by ourselves in this.
23 I mean that is the answer to this.

24 The debtors asked for a one side
25 fits all solution. Our response was yes, a one side

1 fits all make sense, but it needs these kind of
2 modifications. If we are not going to consent the
3 carve out. And we were very careful in our motion
4 to ask for not to be carved out, what we asked for
5 was a fair process. If the fair process is not
6 going to be afforded or what do we view as a fair
7 process, or the Court can decide it is a fair
8 process. And if they do the Court can impose it on
9 us and we certainly will obey the Court's order.

10 But the carve out is not a realistic --
11 again, Your Honor, frankly the debtor filed this
12 motion and they asked for relief under 546(H). And
13 it included all of the elements under 546(H) subject
14 to the rights of the secured creditors and subject
15 to a lot of other things but they left out the
16 consent of the affected creditor.

17 Now what were they going to do when it
18 comes back later. Were they going to say that
19 anybody that didn't object to this motion has
20 consented so they get their goods back when ever
21 they get them back and whatever they are. That's
22 the danger of these things is that this process
23 offers the opportunity for the debtors, and not even
24 having to disclosure to anybody.

25 And, frankly, Your Honor, no,

1 we will not consent to being carved out. If the
2 Court carves us out, the Court carves us out. If
3 the Court overrules our objection, the Court
4 overrules our objection.

5 But our problem is the debtor
6 wanted one size fits all process. It is not only a
7 process it is also a substantive affect. And we
8 suggested a process that has proven out, it has
9 worked in other cases that would be applicable to
10 all. If the Court chooses to disregard that, or
11 rule that it is inappropriate or unfair, we respect
12 that and we want the Court's judgement.

13 Thank you.

14 THE COURT: Mr. Galardi.

15 MR. GALARDI: Your Honor, with
16 respect to the process, I think, Your Honor, in
17 reading through the brief again, I find the process
18 some what -- the reclamation claims are secured
19 creditors under the modification of the code. They
20 have secured creditors rights that can be asserted
21 and they have the rights in pursuing those. What we
22 found, Your Honor, in dealing with all of those
23 protective orders, and then we are going to first
24 day motions to try to avoid being in Court every few
25 days. I understand at the end of the day you are

1 selling goods. And why we draft the procedure the
2 way we do and why we are very clear, if they are not
3 comfortable with these procedures, then you are
4 entitled to file a lawsuit, a request for a stay, a
5 temporary injunction, because we do understand.
6 This is just like outside of bankruptcy, every day
7 those goods get sold their reclamation claims may
8 become less. They can protect their rights. This
9 was a mechanism to give us notice so we can have
10 conversation.

11 But if people are concerned about
12 that then we can carve them out
13 of the motion, or the motion in
14 particular, they are filing an
15 action getting a preliminary
16 injunction and getting their
17 goods. So in that context, our
18 brief is actually helping
19 creditors understand that they
20 have rights now as secured
21 creditors. They can optimize
22 the procedures and know the
23 risk. But if you don't want to
24 be in a procedure, here is what
25 the code says, and by the way

1 the procedure doesn't preclude
2 you from doing what the code
3 says, or what lawyers do, namely
4 file a complaint. Whether he
5 wants to be in or out, what the
6 consequences of saying if you
7 are not happy then you should
8 come in and protect your rights.
9 The debtor is not going to
10 protect all of those rights. We
11 are going to try to work with
12 the committee and come up with a
13 process. We do support our
14 vendors. But this was to get a
15 notice so we can start talking
16 about that. But it doesn't
17 preclude anybody that is unhappy
18 from coming in and asking for
19 relief. So we ask Your Honor to
20 overrule the objection.

21 THE COURT: The Court is going
22 to overrule the objection. I will approve the
23 procedures, and if the creditor wants to opt out of
24 the order, he may.

25 MR. GALARDI: Thank you, Your Honor.

1 Your Honor, we now come to matter 19,
2 which looks like it may have taken a long time,
3 Your Honor, we very much appreciate you giving us
4 the hour to talk before we came in.

5 I am very hopeful to say that we have
6 resolved all but one objection. I think we have
7 resolved these objections. I think this goes to
8 number 19, number 20, and I believe there is one
9 other one. I am going to say some things that what
10 I think we have agreed too. I am sure there are
11 plenty of landlord counsels behind us, behind me
12 that may come up. This is also with the effort and
13 the suggestion of the Committee, who has two very
14 large landlords that have many leases.

15 The first thing we would agree to Your
16 Honor and you can see from our brief that there is a
17 split in authority between a billing date and an
18 accrual date. What we have agreed with every single
19 objecting landlord, we will agree that the accrual
20 method applies. So therefore and we have a number
21 of leases as I explained to the parties, and one
22 reason why you have gotten so many objections to 365
23 before because of the complicated restructure.

24 Your Honor, I think I explained in the
25 first day we have what we call the surplus leases

1 that were already rejected but under rejection
2 motion. We have been going forward the leases that
3 are store closing leases so we are concerned about
4 whether December and how the accrual method works.
5 We have the stores that we have no intention to
6 leave at this particular time. And among those
7 stores some are paid in advance, but unfortunately
8 some are paid in arrears. So there is an objection
9 out there today that somebody would be paid rent on
10 November 30th, but it would go back to November 1st.
11 So we have agreed that regardless of the way your
12 lease works, if you have objected we would apply the
13 accrual method with respect to you.

14 Any landlord who is not an objecting
15 party we will not agree to that. We will reserve
16 our rights to argue otherwise. We understand that
17 the circuit may have the accrual method, but we will
18 reserve our rights to say otherwise to do whatever
19 we need to do. But we are with respect to any
20 objecting landlord in the room we are agreeing the
21 accrual method applies. It applies not only to
22 those who pay in advance but also -- for example,
23 there is one landlord in here that has a November
24 30th payment that would go back. They agreed I
25 don't have to go back all the way to November 1st.

1 I am only going back to November 10th and paying
2 that rent. And to stay consistent with 365(B)3, we
3 are going to actually take up one of the accruals we
4 will pay. That was one of the many points that we
5 did.

6 Your Honor, the second part of
7 this 365(B), we also agree with the landlords that
8 we needed a 365(B)4 extension for the reasons set
9 forth in the record on the first day. We have
10 agreed with the landlords. I think we have resolved
11 every objection in 365(B)4 motion. But to make
12 clear there are carve outs to that 365(B)4 and again
13 we didn't realize the carve outs when we made them.

14 In particular, if you were what
15 we call the (inaudible) leases we didn't have the
16 inventory, this motion does not apply to you. You
17 are carved out. So I still have my 120 days with my
18 rights to ask for an additional 90 days. If you
19 were a GOB store because we are liquidating
20 inventory in those stores. We are going at a store
21 closing store, we are not going out of business. If
22 you are in one of those since we liquidate the
23 inventory, again we are not exceeding the 364(B)4
24 extension. What came to my attention and the banks
25 have agreed too. There were some leases that were

1 in a construction phrase. Obviously we didn't have
2 inventory, but we didn't know and there extensions,
3 we are not seeking an extension with the
4 inconstruction, again, the lenders are concerned
5 about the liquidation of the inventory.

6 Your Honor, we agreed that we would
7 again, and I understand this is an issue in this
8 jurisdiction in particular which I have learned this
9 morning, there is an issue of timely obligation in
10 the accrual of stub rent. Landlords are very
11 concerned about the stub rent, and if we don't pay
12 the stub rent right now there will be consequences.
13 We have agreed to at least for this purpose and
14 there are reasons, business reasons, we have been
15 working with the Committee, any of the requests to
16 have immediate payment of stub rent, whether that is
17 in the form of a motion, or in the form of an
18 objection, or in the form of an objection from the
19 365(B)4, we are saying you don't need to make a
20 motion. If you have already done it, and all such
21 objections are going to be adjourn over to December
22 22nd. With that said because of the accrual method
23 we will agree that they are administrative claims,
24 and we are really talking about the timing of the
25 payments of those. I guess the concern is here that

1 if they delay the payment on it we would ask Your
2 Honor to enter an order to protect them from the
3 delay of any payments right now at least.

4 My understanding is if they
5 receive an order tomorrow and this is today saying
6 immediately pay it they are out of that
7 disgorgement, the dissolution issue, so they were
8 very concerned about that and that is what prompted
9 a number of motions and reactions.

10 We have agreed that, if Your Honor
11 agrees, to help get us to that December 22nd date to
12 not fight the issue of the timing of that thing is
13 and that hopefully get beyond that and to not fight
14 issue, at least from now until December 22nd, the
15 facts that they have delayed, not delay, we asked
16 for a delay, the fact that we are not paying it now
17 should not subject them to dissolution or
18 disgorgement or anything else and we come back on
19 the December 22nd to discuss the issue.

20 In addition, Your Honor, as I've
21 told the landlords, with respect to stub rent, Your
22 Honor, we have two types of leases now. We have the
23 leases that the stores are liquidating during --
24 under the agency agreement although they are not
25 third party beneficiaries of that agreement we have

1 agreed to pay because we are being paid by the
2 agent, we have agreed to pay that rent. Again if
3 you live by the accrual method you are going to die
4 by the accrual method so that means and they all
5 agreed that if we stay on through mid-December that
6 having pay December 1st rent, we will have rent and
7 we can actually vacate the premises, and we are
8 working on what that means, then we only pay for the
9 two weeks so the landlords are agreeing to that sort
10 of method.

11 I think and I know I jumped around
12 because I got to go back to the objection motion,
13 but it all goes as one big piece. Those were the
14 major concerns that resolved the 365(B)4. Your
15 Honor, our motion may read incorrectly, so I want to
16 be clear on the record. If we will have to actually
17 assume or actually reject by the earlier of the
18 confirmation date or the 210 date, not that we would
19 file motion on that date to extend that time period.
20 Now with respect to confirmation we would have to
21 make a notice that we are assuming confirmation, but
22 as normal we would not have those go affective until
23 the affective date and they agreed to that. But we
24 can't change and play games with the confirmation
25 and the affective date to say ha, ha, we assumed it

1 and now are rejecting it. So I think that was
2 another issue that they had that we have resolved.
3 Your Honor, the other things that
4 we have resolved with respect to some of the
5 properties is, and I will wait until they come up,
6 there were a number of people that objected to the
7 rejection. And the issue comes down to a number of
8 issues. This is where I think there is one
9 outstanding objection. We have two problems and
10 most of it comes from did we give the keys back, did
11 we surrender the premises. We have a witness who
12 would be available to testify of that. What I
13 thought we would do in that case is argue that
14 everybody rights are reserved. If you raised the
15 objection that the affective date of our rejection
16 or we didn't surrender the premises for whatever
17 reason, it was not November 9th, or November 12th,
18 or November 19th, or whatever, as long as you agree
19 that it was by November 30th, so we put a perimeter
20 around that date and all rights are reserved and
21 argued whether there was an affective surrender or
22 not, then we have agreed to that. We are not going
23 to put on evidence today of that. We will try to
24 resolve that. And, again, that would be a stub rent
25 claim, if we were wrong and it was not of the

1 affective date and we have our position, they have
2 theirs and then we will talk about if it's two days,
3 three days, four days stub rent. But it will be
4 treated like all of the other stub rent claims
5 without the subject of dissolution on those issues.
6 I think that is resolved. I will find out when I
7 leave the podium of that.

8 Your Honor, then we have our stub
9 rent, the sublease issue. You see a number of
10 objections from landlords where they are the
11 overlord or the sublessee, I believe that we are
12 agreed in accepting in one situation that because we
13 gave notice of the rejection both to the overlord
14 and to the sublessee, will agreed that both have
15 been rejected. Nonetheless, we couldn't do all of
16 this before -- but we still want to do a deal. We
17 are letting them have more time. We will gladly
18 help them. But we will certainly suspend it to
19 December 22nd, if they could work out deals. We
20 have no problems with people working out deals as
21 long as we are clear that there has been a rejection
22 and those people can still fight what the date of
23 the keys were. One landlord still may have an issue
24 on that.

25 Your Honor, then we have the unfortunate

1 circumstances for them, perhaps fortunate for us, is
2 that some of the sublessee pay rent for the month of
3 November on the 1st and we didn't pay rent to the
4 landlord. Since we have money prepetition put into
5 our accounts, we told them we were unfortunately
6 unable to pay that money back. So we agreed that if
7 they want to come in and argue that point we can do
8 that with Your Honor. We can't without an order of
9 the Court say by the way you got sublessee you get
10 back the money. That is something that the Court
11 will just have to decide. We would oppose it.
12 Landlords are free to argue that. We are not
13 resolving that today.

14 But as a compromise on the other
15 side, some landlords did in fact make the December
16 payment. But we didn't pay December rent because we
17 thought they were rejected. What we told the
18 landlords was we are not going to try to make in the
19 postpetition period. That's just an accounting
20 problem. We would if we got it, give the money to
21 the landlords, back to the tenants pending upon the
22 circumstances. That is what they want. Again,
23 there is one landlord that may say we took it and we
24 got the rent. Everybody else has agreed with that
25 provision.

1 We then got to the fifth
2 procedures, Your Honor, and again, I think we got
3 pretty far on all of these and then I will leave the
4 podium to the landlord counsels. There was a
5 concern about notifications with respect to this
6 procedure adequate insurances, and I'm hoping that
7 we settled these in this environment. But as a
8 precaution what we have agreed to do, and I think
9 there is a December 17th date by which we would have
10 to give notification to the parties as to the
11 bidders of the properties for adequate insurance
12 information. We would by Friday noon post on the
13 website and hopefully send out to the landlords, if
14 there is a bid on their property we would notify
15 them of the potential bidder. And I think the
16 hearing is December 22nd, so the ideal is give them
17 notices back.

18 We would modify the bid requirements of
19 anyone who wants to bid on them. So if we don't get
20 a bid we are going to give that five days notice of
21 the date of rejection. But the rejection would be
22 affective again this goes to what constitutes
23 surrender, we would give notice, you get five days
24 notice to turn over or shut off the alarm code. And
25 I said we would make reasonably efforts to give them

1 the alarm code and turn over the keys and to
2 deactivate the system if we are not going to be
3 there.

4 And with respect to third parties
5 we would try to -- they were concerned about the
6 property. We are aware of perhaps the collateral of
7 the banks. What we would do is try to give notice
8 and we will do the best that we can to all third
9 parties that we believe have property in there. And
10 the same five days notice saying take it or it will
11 be given to the landlords free and clear so they
12 don't have a liability should they get it, should
13 they throw it out, or should they sale it.

14 We also agreed, Your Honor, that it is
15 really not appropriate until the actual sale of the
16 property, if the period of time that the order may
17 become immediately affective. That would be
18 December 22nd if we are in the position to that.

19 Finally, Your Honor, I think on December
20 22nd what we have agreed to is we would only go
21 forward on the uncontested sales of leases, and if
22 there is a contestant matter with respect to the
23 sales of the leases and the parties couldn't agree
24 to go forward on December 22nd, we would come up
25 with some hearing, Your Honor. If we need to do it

1 before the year end, we would ask for time for that.
2 But at least we will agree temporarily not to try to
3 force if the parties are not prepared to go forward
4 on December 22nd, given that date, it's the 17th and
5 18th becomes the weekend and then we are back here
6 so we would agree to that.

7 Let me test my memory and see if
8 there is anything else. Now my understanding, Your
9 Honor, with respect to all of the parties other than
10 I think two parties, one of the sublease and the
11 rejection, one trying to determine by putting off
12 motion to compel could be done on December 22nd. I
13 actually think that resolved all of the objections
14 to the rejection motion, which was number 19. It
15 resolves a lot of objections to 20 as well Your
16 Honor. It resolves all of the objections with
17 respect to the motion listed on 21, which is the
18 extension of the 365(B)4. I think we should
19 probably stop there and let the counsels go. I will
20 go back to this, motion 20, which is the agency is
21 resolved by I believe most -- I see Mr. Branch
22 coming up -- but in addition, Your Honor, we want to
23 make clear in a modified order, as Your Honor is
24 probably familiar the agent has been dealing with
25 landlords on all of those issues. We want to make

1 clear that the agent could landlords that are
2 enforceable. We want to make sure that the agents
3 have the authority to do so, that those letter
4 agreements could be approved and finally that the
5 sale of the would be free and clear of all those
6 claims and encumbrances. Again, the bank group had
7 agreed to the original motion to do that. If there
8 is an issue with the bank group, that we would in
9 fact make sure that is possible on that aspect.

10 Your Honor, I may have missed some
11 parts of my script before they all come up and
12 speak.

13 THE COURT: Let me ask you this
14 question, please. Should we plan a lunch break?
15 Would it make sense to talk a little bit with the
16 landlords to see if there was something not put on
17 the record because it sounds like to me that you
18 made tremendous progress this morning in just one
19 hour. Does it make sense for us to take a break or
20 do you want to push through?

21 MR. GALARDI: Your Honor, I think
22 we should take a break. I'm not sure that there are
23 many other matters. But it may be worth it to take
24 a break. Let me go through this, 22 is a motion to
25 compel rent. And 23 is the same, 24 is the same, 25

1 is the same. Your Honor, has already disposed of
2 26. And 27 is again a motion to compel rents. And
3 28, Your Honor, is to the supplemental sales use.
4 Your Honor, I believe with one change to number 29,
5 that is also resolved. The landlords have asked for
6 clarification on that as well. It's the later of,
7 they don't have to file a general bar date. It is
8 the date by which it's 30 days after rejection, what
9 ever is the later of those two. So they don't have
10 to put in all of their prepetition damage claims.
11 There is an outstanding objection. We are agreeing
12 with the agency governing 180 days. That takes us
13 to number 30, I believe, that will be a matter we
14 will be hopefully resolving. Number 31, Your Honor,
15 is already handled. And 32 would be addressed and
16 33. So I do think a break at this point might clean
17 the whole agenda except for maybe a couple
18 objections.

19 THE COURT: All right. We will go ahead
20 and do that.

21 How long do you want to take a break?

22 MR. CURLY: Paul Curly, I want to
23 introduce the Court to Mr. Cunningham. I have an
24 obligation this afternoon and I was going to ask Mr.
25 Cunningham to be able to appear without me being

1 present.

2 THE COURT: Certainly. That will be
3 granted.

4 How long do you want to break for?

5 MR. GALARDI: Your Honor, if you want
6 to take a lunch break now, it's 1:00. Would 2:00
7 give everybody enough time. I think a break until
8 2:00 and we can work the language out and that will
9 give your staff time to have lunch and we can finish
10 this up.

11 THE COURT: We will stand adjourn until
12 2:00.

13

14 (A lunch recess was taken.)

15

16 THE COURT: I see everyone is back.

17 MR. GALARDI: Your Honor, there is a
18 gentleman here that is not on the agenda, who
19 represents the monitor in Canada. I think we should
20 take that one first before we go back on the docket.

21 THE COURT: Who in Canada?

22 MR. GALARDI: As you know we filed a CCWA
23 proceeding.

24 THE COURT: Yes, sir.

25 MR. GALARDI: And he would like

1 to say a few words to the Court.

2 THE COURT: All right.

3 MR. GALARDI: Thank you.

4 MR. SMITH: Good afternoon, Your Honor.

5 Thank you for hearing us. J.R. Smith from Hutton &

6 Williams. With me today is Mr. Ken Coleman. I

7 would ask you if he may be heard today.

8 THE COURT: Yes, sir.

9 MR. COLEMAN: Thank you, Your Honor.

10 I will be very brief. Those proceedings

11 are commenced in Canada that these Ch. 11 cases were

12 commenced. We represent the monitor who was

13 appointed in that proceeding. As Your Honor may be

14 aware the appointment of a monitor is required on

15 the statute. There is a great deal of attention

16 being paid in the Canadian proceedings. Very

17 briefly, I just wanted to outline a couple of points

18 to the Court. One is the monitor's role in the

19 Canadian proceeding. The monitor is an officer of

20 the Court. He is not a party to the proceeding. He

21 is independent, neutral, and intended to assist the

22 company and the creditors to achieve a

23 restructuring.

24 One of the functions of the monitor

25 is to file periodic reports that is the principal

1 means of the communication of the Court to appoint
2 the monitor and the principal means of
3 communications between the creditors,
4 constringencies in the proceedings. We have done a
5 fair amount of work representing monitors in the US
6 cases. And some Courts have found it helpful to
7 receive copies of those reports to be filed into the
8 US proceeding. We are happy to do that here if Your
9 Honor thinks that would be of interest or somehow
10 informative. We are happy to proceed on that basis
11 if you think that would be helpful to the court.

12 Later today, I think in about an hour's
13 time there is a hearing to approve a sale process
14 and that is designed to be a dual process, Your
15 Honor, a stand alone process for sales or in
16 conjunction with a larger transaction made. That
17 process in Canada is on a pretty fast track.
18 Proposals, current proposals are due by the 15th of
19 January. And it is intended or at least proposed in
20 the order that will be submitted today that the
21 monitor have full participation in that process in
22 Canada. That transaction if it goes forward would
23 require approval by the Court and depending on the
24 other aspects of the deal particularly if there are
25 some US elements to it, there may be a need for

1 coordination and cooperation between this Court and
2 the Canadian Court. It may be useful in that regard
3 for the two courts to have communication. And we
4 would make available to your chambers the contact
5 information if Your Honor would feel that it is
6 appropriate to communicate.

7 Just very briefly, Your Honor, the other
8 two items up for today in Canada are extension of
9 the stay, proposals to extend that out to January
10 30th and as well to make certain modifications to
11 the initial order that was granted on the first day.

12 Your Honor, if you think it would be
13 helpful to this Court we can file those pleadings
14 and those orders along with the reports as you wish,
15 and provide as much or as little information as Your
16 Honor would desire to see. Those are my comments.

17 Thank you very much.

18 THE COURT: Thank you very much.

19 Mr. Galardi, do you think those would be
20 helpful to have the reports or any of those
21 pleadings filed in connection with this case?

22 MR. GALARDI: Your Honor, I have know
23 objection if you have an interest to do that.

24 THE COURT: I don't know if we need
25 to have the pleadings filed.

1 MR. GALARDI: Your Honor, we have been
2 involved with the monitor. We have discussed the
3 process and how it coincides with the process here
4 in the United States. We had a meeting already with
5 the monitor. I think having the monthly reports
6 that they do is a good ideal. If there is some
7 pleading that they thought is really important they
8 could always file it. The reports might be a good
9 ideal to get.

10 THE COURT: Very good.

11 MR. COLEMAN: Thank you, Your Honor.

12 MR. GALARDI: I do believe we have
13 resolved the landlord type motions and all of the
14 issues. I would turn to matter 19. Matter 19 is
15 the motion of us to reject leases and to abandon
16 property. I guess I missed a couple of things that
17 I would like to put on the record with respect to
18 this that I think finalizes it.

19 There are three objections, Golf Galaxy,
20 Dick's Sporting Goods, and Dollar Tree. We have
21 agreed to adjourn their objections to rejection over
22 to the January 29th date.

23 THE COURT: Those are Golf Galaxy, Dick's
24 Sporting Goods, and Dollar Tree?

25 MR. GALARDI: Yes, Your Honor.

1 There are also agreements
2 between landlords and subtenants that we are going
3 to have side deals where there will be assumptions
4 and assignments as opposed to a challenge of
5 business judgement, where we had at least made it
6 neutral, I believe, with landlords. One would be
7 Cardinal Distribution would be the landlord and GEI
8 is the subtenant doing business as CP Transportation
9 Systems. The second would be OLP6609 Grand LLC with
10 Lazy Boy as the subtenant. And then I have, I think
11 it's Ban CCIWR Business Trust with DHL. So we would
12 seek to have those agreements. Your Honor, with
13 respect to the actual date of rejection as well as
14 you have seen a lot of landlords say we have
15 banished the property especially with types of
16 claims they may have in addition to stub rent, all
17 rents are reserved. We are not trying to say that
18 there is not an administrative claim. We are not
19 saying that there is. We are just reserving all
20 rights for people to make any claims they want out
21 of this including a claim for stub rent and
22 contesting whether we actually are entitled to the
23 date of rejection. If I'm not mistaken that
24 resolves all of the objections.

25 THE COURT: Thank you.

1 Does anybody wish to be heard in
2 connection with the motion authorizing rejection of
3 an expired lease?

4 MR. LESTERMAN: Robbie Lesterman.
5 Your Honor we filed a joinder in the objection of
6 Dick's Sporting Goods.

7 THE COURT: Right.

8 MR. LESTERMAN: We filed it last
9 yesterday evening. The objection is docket number
10 275, I believe. And I just want to make it clear
11 that we just simply join in that objection. We are
12 the primary landlord with respect to that lease and
13 so we have no problem with carrying that objection
14 or joiner over to the 29th.

15 THE COURT: Thank you.

16 MR. LESTERMAN: Thank you.

17 MR. GALARDI: Your Honor, there is one
18 lease that we have not moved to reject, or didn't
19 apparently have it on our sublease rejection, that
20 we agreed with Counsel that we would do.

21 MR. CUNNINGHAM: For the record, Your
22 Honor, Gary Cunningham appearing on behalf of the
23 landlord in Detroit, the service center for Circuit
24 City in that geographic location. There is a
25 subtenant, apparently a subtenant lease that we

1 weren't party too. They have not received any
2 notification of what is happening here in this Ch.
3 ll proceeding. Counsel for the debtor and I have
4 agreed that that needs to be resolved as well. And
5 I believe debtor will take all of the steps
6 necessary in order to get notice in file a motion in
7 order to reject that sublessee.

8 MR. GALARDI: That's correct, Your
9 Honor.

10 MR. CUNNINGHAM: And we also agreed,
11 Your Honor, as other landlords have on the proration
12 method being the law of the case here. The only
13 other issue we have is our damage claims and we
14 agreed that we will preserve those as the same as
15 the debtor. And I think that resolves everything.

16 THE COURT: Very good.

17 What is the docket number? Did
18 you file an objection?

19 MR. CUNNINGHAM: We did, Your Honor,
20 docket number 260. I'm not certain what the letters
21 were. The original one was 260.

22 THE COURT: That's sufficient. Thank
23 you.

24 MR. CUNNINGHAM: Thank you, Your Honor.

25 MR. GALARDI: Your Honor, the other

1 one is there is an objection, I think it's docket
2 number 368, Home Family Trust, we have reached an
3 agreement with Counsel.

4 I think that resolves all of the
5 objections on number 19. What we intend to do is
6 work on an order and we will circulate an order on
7 Monday morning, circulating to the parties so that
8 they can review it to make sure I've gotten
9 everything.

10 THE COURT: So do you anticipate
11 there will be one order for every landlord, or are
12 you going to circulate separate orders for each of
13 the landlords who have objected?

14 MR. GALARDI: Good question. I
15 think what we will do is resolving their objections,
16 Your Honor, because remember this was a motion to
17 reject, they objected to that. So we will circulate
18 it to them. And if they need a separate order then
19 we will do a separate order trying to get on record
20 any agreements, if necessary, if they are
21 comfortable with my representations. They can
22 contact us if they want an order for that.

23 THE COURT: All right. Very good.

24 MR. GALARDI: Your Honor, may I have
25 permission that if we don't need to file an order

1 but we have an agreement by email or other way that
2 that will be sufficient instead of filing an order
3 or stipulation, if landlords are comfortable with
4 that.

5 THE COURT: That is fine with the
6 Court.

7 MR. GALARDI: Thank you, Your Honor.

8 Your Honor, as I move to matter 20, I
9 believe that this is the motion with respect to the
10 Gordon Brothers. Your Honor, I neglected to say --
11 I mentioned that there was (inaudible) Company that
12 was being sold. Your Honor we amended the agreement
13 with respect to sale. What had happened was we
14 decided to go away from Gordon Brothers and thought
15 we had a better deal and it was our only option to
16 do so. Then once we received the better deal we
17 then circulated that deal and Gordon Brothers made
18 the higher proposal, which is reflected in the
19 letter of agreement. We shared that letter with the
20 creditors committee. I wanted to bring that to the
21 Court's attention so we ask for approval to proceed
22 that way.

23 In addition, Your Honor, I missed
24 a number of little points, well big points to
25 everyone. First landlords will be authorized to

1 appear at the auctions whether they bid or not.
2 Second is that landlords will be entitled to credit
3 bid, we have the right to contest whether it's a
4 valid amount. And those credits will include both
5 prepetition and postpetition accrual again with
6 respect to the landlord's bidding.

7 In addition, the landlords if bidding on
8 their own lease would not have to make a good faith
9 deposit on their own lease. It is their own lease.
10 Obviously if they go on any other lease they get
11 treated like any other bidder.

12 I may have misspoken that the adequate
13 insurance information be transmitted is actually
14 December 16th. And then I have the obligation by
15 December 19th at noon put on the record where these
16 properties have gone. And I'm loosing my notes on
17 the December 17th date. Secured objection deadline,
18 which I didn't refer too. Apparently there is a
19 shorter period with our modifying this order, that
20 will be modified over the weekend. It's already a
21 deadline, but we are essentially extending the
22 deadline for persons to make objections. It will
23 give the landlords more time to make the
24 calculations and make the objections. And then any
25 amounts if we do sell the properties and we have an

1 agreement, or to the extent we have an agreement, we
2 would pay up the amount and we are not going to hold
3 the landlords hostage to the full amount being
4 resolved unless there is such a gigantic difference
5 that we can't agree. But I can't imagine that will
6 be the case. We will pay the uncontested amounts at
7 that point and then we can resolve any other
8 additional amounts at a later point. I believe that
9 there resolves all of the objections to number 20.
10 And on this one what we were doing and Counsels to
11 the landlords have been very helpful here, we have
12 modified the order to reflect all of my comments,
13 the additional comments. The ideal would be to
14 circulate this order to the objecting parties. We
15 ask if they don't have their emails on something we
16 already have to give us their emails to circulate
17 that order on Monday morning and then to get all
18 comments around noon or 1:00, and then try to
19 circulate and file that order for Your Honor by the
20 end of the day, Monday. It may split to Tuesday.
21 We will be sure to get these deadlines out there.

22 THE COURT: All right. Very good.

23 Does any party wish to be heard with
24 connection of this motion?

25 MR. FEINSTEIN: Robert Feinstein

1 with the creditors committee, we just ask even
2 though we didn't object to this that we be included
3 in all of these orders being circulated.

4 THE COURT: I would assume you
5 would be included or at least that would be my hope.

6 MR. GALARDI: Yes, sir.

7 Your Honor, I think on the hearing
8 we have the whole day scheduled for the 22nd.

9 THE COURT: You do.

10 MR. GALARDI: What I would suggest
11 is that at least this matter be scheduled for the
12 afternoon. If we have a big enough calender we can
13 deal with other things in the morning. But at least
14 this matter be scheduled for the afternoon if that
15 is acceptable. And maybe we can resolve some
16 objections on some other matters if that is
17 acceptable.

18 THE COURT: That is acceptable.
19 So we will set this matter down for 1:00.

20 MR. GALARDI: That will be great,
21 Your Honor. Thank you.

22 Your Honor, now we turn to matter
23 21 on the agenda, which is the debtor's motion to
24 extend time under 365(d)4. As I earlier mentioned,
25 Your Honor, we would be extending the time but it

1 would all be for the 210 days that would have to be
2 done to assume or reject it. Clarification on the
3 record, Your Honor, we put in the order a paragraph
4 that provides that we will satisfy our client's
5 obligation that is required by 365(d)4. And then
6 the way that we worked out a procedure is that
7 landlords, if they believe we have not done so, they
8 will give us five days notice. We will have five
9 days to either fix it or we agree to have to come
10 back to the Court on an expedited basis. I think
11 that resolves all of the objections with respect to
12 -- and the other things I said earlier with respect
13 to the 365(d)4. I think that is the thing that I
14 missed earlier.

15 THE COURT: All right. Very good.

16 Does any party wish to be heard in
17 connection with the motion to extend time in which
18 the debtor may assume or reject leases?

19 MR. EPPS: Good afternoon, Your
20 Honor, H.C. Epps, Jr. on behalf of many of the
21 objecting landlords. I asked Mr. Galardi and he has
22 given me permission to clarify something that he
23 said earlier about the timing. Our group of
24 landlords and another of others have objected to the
25 payments and stub rent for any period of time based

1 on the language, would have get paid in a timely
2 matter in order to avoid be put into the general
3 administrative expense claims pocket only paid at
4 the end of the case. We had agreed as to the
5 landlords, the payments is considered to be made as
6 of today whether or not it's heard at some other day
7 and that issue will not be raised as to us, the fact
8 that we were not here on a timely basis, that was
9 spoken before lunch but I want to clarify that was
10 what we worried about and we do have an agreement on
11 the issue.

12 THE COURT: Very good.

13 MR. EPPS: Thank you.

14 THE COURT: Thank you.

15 MR. MCCULLAGH: Good afternoon, Your
16 Honor, Neil McCullagh. I have filed a motion to be
17 here today. I would allow Mr. Wood to address the
18 Court on this.

19 THE COURT: Mr. Wood.

20 MR. WOOD: Thank you, Your Honor.

21 Your Honor, our lease is one of
22 the under construction leases, no inventory, it
23 originally was on the extension list and now
24 it's been taken off and we appreciate that. The
25 debtor, as Counsel said, the current date now will

1 be March 10th as the drop dead date for
2 assuming or rejecting and we realize that
3 and the debtors has reserved its right to extend
4 that time. We realize that.

5 But we just want the record
6 to be clear that we are reserving all rights
7 to seek a shorter period, but we will reserve
8 our rights to do so. We have about approximately
9 \$736,000.00 contract on the particular lease
10 and under California law they have a time limit
11 in which they can affect that. And some of
12 those time limits are going to be coming due.
13 Certainly they will be coming due before
14 March 10th. Some of them will be coming due this
15 month. We already had one. We actually had two
16 filed and we anticipate a lot more. The parties are
17 working on the termination agreement and I hope that
18 the parties will be able to resolve this, but if not
19 we may be back as soon as December 22nd telling you
20 that if this needs to be compelled -- I didn't want
21 the Court to be surprised by that so we are
22 reserving our rights to do that.

23 THE COURT: Thank you.

24 MR. WOOD: Thank you.

25 MR. CREMSHAW: Good afternoon,

1 Your Honor, William Cremshaw on behalf of various
2 landlords and particular with regard to objection
3 607. We have a distribution center in California
4 where our rent is due in and we agreed with the
5 debtor for a payment that was due on November 30th,
6 we have agreed to prorate that from the postpetition
7 period with the understanding that in the event the
8 lease is subsequently rejected we would also be
9 entitled to run it on a prorated basis.

10 So if they reject it on the
11 15th of the month then we would get half of the rent
12 for that month even though the rent wasn't due until
13 later. We just wanted to clarify that for
14 the record.

15 THE COURT: Thank you.

16 MR. GALARDI: Your Honor, the clarification
17 on the proration are absolutely fine. One of the
18 clarification -- I guess the benefit of being an
19 objector is hearing some of the argument
20 from other counsel. So I will make it clear.
21 if you are an objector even if you didn't ask
22 for your stub rent on any one of those three
23 documents but you are here objecting to any one
24 of those three motions you still have the right
25 and you don't have to file, you can make argument

1 and get what ever benefit with respect to stub rent
2 on December 22nd.

3 THE COURT: That is what I understood
4 you to say before we took the break.

5 MR. GALARDI: And, Your Honor, finally
6 on 365(d) motions to compel, and motions to shorten
7 time we reserve all of our rights as we do
8 otherwise.

9 MR. LEUSIN: Your Honor, if I may
10 be heard telephonically?

11 THE COURT: Who is speaking please?

12 MR. LEUSIN: Your Honor, this
13 is Sean Leusin. I represent VIWY Limited
14 Partnership. We filed an objection and I believe
15 it's docket number 711, with respect to this matter.

16 Mr. Galardi said earlier that
17 the deal that was set forth on the record related
18 to landlords in the room, and he just said a
19 moment ago landlords that are there, I just want
20 to make sure it covers me telephonically.

21 MR. GALARDI: Yes, as long as Mr.
22 Leusin stays on the phone. I meant anybody that has
23 filed an objection, Your Honor.

24 MR. LEUSIN: Thank you.

25 THE COURT: All right.

1 MR. GALARDI: Your Honor, I think
2 that is all of the objections to 21 so we will be
3 putting in an order with respect to that.

4 Your Honor, I haven't identified
5 every counsel with every lease, but I think number
6 22 has now been continued over to the December 22nd,
7 which is the motion of Burbank Mall Associates to
8 postpetition rent.

9 MR. (inaudible): I represent
10 Burbank Mall and that is correct, and also with
11 number 23 Crown CCI.

12 THE COURT: That is going to be
13 carried over to the 22nd.

14 Now will that be at the 1:00 time;
15 is that correct?

16 MR. GALARDI: Yes, Your Honor.

17 If it would make it easier for all
18 landlord counsels to do their matters at 1:00, and
19 then whatever else we can do in the mornings I think
20 would be appropriate.

21 THE COURT: That is what I thought
22 you said, I just wanted to make sure I understood.

23 MR. GALARDI: Your Honor, I think
24 that takes care of matter 23 as well.

25 Now I'm up to matter 24, which

1 is also a motion to compel rents, to pay
2 administrative rent. Again, I don't know which
3 Counsel represented them but there is an agreement
4 to adjourn.

5 MR. MICHAEL (inaudible): I represent
6 woodlawn Trustees, also represent docket 25, 502-12
7 86th Street, and number 27, the Basile Limited
8 Liability Company and we do agree to adjourn on the
9 22nd.

10 THE COURT: And that will be at
11 1:00 also.

12 MR. GALARDI: Your Honor, that
13 takes care of numbers 24, 25, 27, and number 26 on
14 the docket is already handled. And I think we moved
15 number 27 to the 22nd.

16 THE COURT: That's correct.

17 MR. GALARDI: Number 28 is already
18 addressed, which brings us to matter 29, debtors
19 motion a bar date. There are a number of objections
20 filed and I know there are a number of landlord
21 objections, and there are a number of taxing
22 authorities objections. I think the landlord
23 objections are now resolved. We have a language
24 I will make it clearer, that it is the later
25 of the bar dates 30 days after the rejection

1 or as otherwise provided in any order by the
2 Court.

3 I don't know if there are other
4 parties in court that have objections to the
5 bar date, notice or order. And I don't know
6 if Your Honor has any other concerns.

7 THE COURT: Does any party wish
8 to speak to the motion of setting the bar dates?

9 It appears that you have resolved
10 all of your objections to the Court's finding.

11 MR. GALARDI: Thank you, Your Honor.
12 We will submit an order reflecting those changes,
13 again with the revisions.

14 Your Honor, let me turn to matter
15 30, which is the bidding. Again, I think with all
16 of the representation I have put on the record
17 and of the order, I believe that resolves the
18 matters listed in number 30.

19 THE COURT: Does any party wish to
20 be heard?

21 MR. DAVID (inaudible): I really have
22 more of a question on next Monday on the 22nd. I
23 filed in some my motions requesting joining with
24 other landlords. I don't have a substantive objection
25 as to the information -- would the Court entertain

1 just one party with other counsel to piggyback in
2 with other Counsel on the same issue and let them
3 argue the issue and abide by the Court's order.

4 THE COURT: Certainly.

5 MR. GALARDI: Number 31 is the
6 Panasonic motion, Your Honor. I think Your Honor
7 has already ruled on that matter.

8 Number 32 is another motion
9 to compel the immediate payment of stub rent.

10 My understanding is that has already
11 been resolved Your Honor.

12 MR. WESTERMAN: That's correct.

13 THE COURT: You need to identify
14 yourself.

15 MR. WESTERMAN: I'm sorry.
16 Robbie Westerman.

17 THE COURT: Thank you.

18 MR. WESTERMAN: It's docket number
19 471, Your Honor. It was a motion to compel
20 payment of rent. I think it may be number 31 on
21 the revised agenda.

22 MR. GALARDI: I think it's number
23 32, Your Honor.

24 THE COURT: Yes, I have it as number
25 32.

100

1 MR. WESTERMAN: That matter has
2 been resolved.

3 THE COURT: All right.

4 MR. WESTERMAN: And we have prior
5 objections as well that has been resolved and that
6 can be taken off as well.

7 THE COURT: All right.

8 MR. WESTERMAN: Thank you.

9 MR. GALARDI: Your Honor, that brings
10 us to the last matter on the agenda, which was
11 demand by Green 521, this is I believe again a stub
12 rent issue. And I believe that it is resolved,
13 actually putting that over to the 22nd.

14 THE COURT: So we will put that over
15 to 12-22 at 1:00.

16 MR. GALARDI: That concludes the
17 matters on the agenda, Your Honor. And I appreciate
18 all of the time for being able to talk.

19 THE COURT: Thank you. I compliment
20 Counsel on being able to resolve all of these
21 complicated issues.

22 MR. GALARDI: Thank you.

23

24 (Hearing concluded.)

25

1 CERTIFICATE OF COURT REPORTER

2

3 I, Anne M. Nelson, hereby certify that I,
4 having been duly sworn, was the Court Reporter in
5 the United States Bankruptcy Court, Richmond,
6 Virginia, on December 5th, 2008, at the time of
7 the hearing herein.

8 I further certify that the foregoing transcript
9 is a true and accurate record of the testimony and
10 other incidents of the hearing herein.

11 Given under my hand this 12th day of December, 2008.

12

13

14 /s/ Ann Marie Nelson
15 Court Reporer

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EXHIBIT D



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Page 1

Not Reported in F.Supp.2d, 2006 WL 2992495 (E.D.Va.)
(Cite as: **2006 WL 2992495 (E.D.Va.)**)

HOnly the Westlaw citation is currently available.

United States District Court, E.D. Virginia,
Alexandria Division.
In re U.S. AIRWAYS, INC. et al., Reorganized
Debtors.
Philip A. Garland, Appellant,
v.
US Airways, Inc., Appellee.
No. 1:06CV539.

Oct. 13, 2006.

Philip A. Garland, Las Vegas, NV, pro se.

[Douglas Michael Foley](#), McGuireWoods LLP, Norfolk, VA, for Appellee.

MEMORANDUM OPINION

[LEONIE M. BRINKEMA](#), District Judge.

*1 Before the Court is the appeal of Philip A. Garland (“Garland”) of the decision of the United States bankruptcy court granting summary judgment in favor of U.S. Airways, Inc. (“US Airways”) on Garland’s claim for \$17 million, which was based on allegations of racial discrimination, retaliation, and harassment surrounding Garland’s employment with and termination by U.S. Airways as a pilot.

The bankruptcy court found that Garland’s claims were barred as a matter of bankruptcy law and, in the alternative, barred by *res judicata*. The bankruptcy court further found no evidence supporting Garland’s motion for sanctions. These findings were fully supported by the record and will not be disturbed. Accordingly, this Court will affirm the decision of the bankruptcy court.

I. Background and Procedural History

A. Garland’s Litigation Against U.S. Airways in 1986

US Airways hired Philip Garland as a pilot in 1984. [FNI](#)
In April 1986, Garland filed a lawsuit against U.S.

Airways alleging racial discrimination in U.S. Airways’s hiring and recruitment practices. *Garland v. U.S. Air, Inc.*, [767 F.Supp. 715 \(W.D.Pa.1991\)](#). Following trial in 1991, the district court found that if not for certain discriminatory recruitment, interviewing, and hiring practices used in the early 1980s, Garland would have been hired in 1982. Accordingly, the court ordered U.S. Airways to assign Garland retroactive seniority to November 13, 1982, and enjoined U.S. Airways from further discriminatory conduct in its hiring and recruitment.

[FNI](#). Garland flew primarily B737 and DC-9 aircraft, and during his employment, he was promoted to 737 Captain, a position he held until October 1999.

B. Garland’s Promotion and Subsequent Termination

In 1999, Garland voluntarily bid for the opportunity to serve as a captain for a new aircraft type, the B757/767. He was awarded the bid based on his seniority, and completed his training for the B757/767 on October 27, 1999. The completion of this training enabled Garland to receive his Federal Aviation Administration (“FAA”) type rating and airline transport (“ATP”) license on the B757/767. Garland served as a reserve pilot on the new aircraft type, meaning he did not hold a regularly scheduled line of flying but was contacted for flights according to the needs of U.S. Airways. Garland was required to return for his annual proficiency check (“PC”) by the end of October 2000. On October 29, 2000, Garland took and failed the PC. Under the U.S. Airways-Air Line Pilots Association (“ALPA”) collective bargaining agreement, Garland was entitled to, and did receive, five hours of training in a flight simulator, followed by an opportunity to retake the PC. Garland failed his second PC on November 14, 2000. Following Garland’s second failed PC, the FAA invoked its right under [49 U.S.C. 744709 \(2000\)](#) to require Garland to submit to an FAA examination, known as a “44709 check ride,” to determine whether Garland should continue to hold his airline transport pilot license.

Under the collective bargaining agreement with ALPA, U.S. Airways was required to provide Garland

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with five hours of additional training. However, at Garland's and ALPA's request, U.S. Airways agreed to provide Garland with a full transition training course of 115 hours of additional training, normally given only to pilots with no experience flying the aircraft in question. Despite completing the training, on February 15, 2001, Garland took and failed the 44709 check ride.

*2 After failing the 44709 check ride, Garland voluntarily surrendered his Airline Transport Pilot Certificate for the B757/767 Type Ratings to the FAA, in lieu of the FAA suspending his certification. Once the certificates were surrendered to the FAA, Garland was not lawfully permitted to operate a commercial airline flight and U.S. Airways was not permitted to use Garland as a pilot.^{FN2}

^{FN2}. Because he surrendered his certificates, Garland was no longer legally permitted to fly *any* commercial flight, which precluded him from returning to his position as 737 Captain.

Although not required to do so, the FAA agreed to provide Garland with a second 44709 check ride using a different examiner, and U.S. Airways agreed to provide five hours of additional training. On March 7, 2001, Garland failed his second 44709 check ride.^{FN3} The FAA would not return Garland's certificates or recommend him for further PCs. Because it could no longer use Garland as a pilot, U.S. Airways permanently terminated his employment in December 2001, after an investigation of the termination decision.

^{FN3}. The record is not clear as to what specifically caused Garland to fail his PCs or his 44709 check rides.

C. Garland's Post-Termination Litigation

Garland unsuccessfully litigated his dismissal in the Western District of Pennsylvania, through an arbitration proceeding, and in U.S. Airways's bankruptcy proceedings. After being fired by U.S. Airways, Garland first filed a civil contempt complaint on December 4, 2001 in the district court for the Western District of Pennsylvania, arguing that U.S. Airways's decision to fire him violated the injunction issued by that court in 1991. Although he sought to re-open the 1986 case, he named new defendants, including the

two FAA inspectors who had conducted the 44709 check rides, without seeking leave to amend his original complaint.

Garland's termination was simultaneously litigated in an arbitration proceeding brought under the U.S. Airways-ALPA collective bargaining agreement. The arbitration hearing was held before the ALPA System Board of Adjustment ("Board") July 16-17, 2002. At issue in the arbitration was whether U.S. Airways was justified in terminating Garland. At the hearing, Garland was represented by ALPA counsel, who had the opportunity to present evidence, testimony, and arguments and to cross-examine witnesses. Post-hearing briefs and reply briefs were submitted, and the record was completed on October 22, 2002.

By an opinion issued on February 7, 2003, the arbitration was concluded when the Board upheld U.S. Airways's termination of Garland as justified. Although it observed that the issue formally presented for arbitration was whether Garland's termination was justified as a contractual matter, the Board addressed Garland's discrimination claims, finding that there was "absolutely no support for such [discrimination and retaliation] allegations about the Company's treatment of the grievant." *US Airways, Inc. v. The Air Line Pilots Association International*, DIS 01-05-03 (unpublished) (2003) (Krinsky, Arb.). As a contractual matter, the Board found the termination justified because Garland no longer held the ATP license required to work as an airline pilot after his certificates were surrendered to the FAA.

*3 While the arbitration was pending, in December 2002, the district court granted the FAA inspectors' motion to dismiss, and dismissed the remainder of Garland's civil contempt complaint *sua sponte* after finding that Garland's termination was already being adjudicated before the U.S. Airways-ALPA System Board, the completion of which "would obviate the need for further litigation" ("the December 2002 order").

In March 2003, Garland filed a motion for reconsideration of the December 2002 order, alleging that U.S. Airways had engaged in fraud to obtain the arbitration award. This motion was denied.

On May 7, 2003, Garland filed in the Western District of Pennsylvania a "Motion for Trial de Novo and

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Hearing Date,” again under the caption from the 1986 case, requesting that the court vacate the arbitration decision and hear his contempt and civil rights claims “de novo.” The court again dismissed the motion on grounds that it was an untimely filed motion for reconsideration of the December 2002 order. Garland appealed this decision and the decision to deny his March reconsideration motion to the United States Court of Appeals for the Third Circuit, which affirmed the district court’s decisions in all respects. *Garland v. U.S. Air Inc ., et al.*, No. 03-2557 (3d Cir. Oct. 9, 2003).

In January 2004, Garland filed yet another pleading in the Western District of Pennsylvania again under the 1986 case caption, titled “Motion to Vacate and Set Aside Orders Upon Evidence of Fraud, Fraud Upon the Court, Collusion and Corruption Pursuant to [FRCP 60\(b\)](#); Motion for Contempt; Motion to Add New Claims and Parties and Scheduling Order.” In this motion he alleged that both the December 2002 order and the February 2003 arbitration decision were procured by fraud. In July 2004, the district court once again dismissed Garland’s motion as an untimely filed motion for reconsideration. Garland filed a second notice of appeal with the Third Circuit.^{[FN4](#)}

^{[FN4](#)} On October 11, 2005, the Third Circuit issued an Order dismissing Garland’s appeal because of U.S. Airways’s bankruptcy proceeding. *Garland v. U.S. Air, Inc.*, No. 04-3155 (3d Cir. Oct. 11, 2005).

On February 7, 2005, Garland filed a new Complaint in the Western District of Pennsylvania, which he was permitted to amend for a second time on November 28, 2005. One defendant named in the case, the arbitrator who presided over the arbitration decision, has been dismissed, but otherwise that case is still pending.

D. US Airways’s Chapter 11 Proceedings

US Airways, together with its parent holding company and several affiliates, filed a chapter 11 petition for reorganization in the bankruptcy court on August 11, 2002 while Garland’s district court and arbitration proceedings were in progress. On October 1, 2002, Garland filed a proof of claim (Claim No. 146) in that proceeding, seeking \$17 million for alleged racial

discrimination, retaliation, and harassment. Garland attached a copy of the complaint he had filed in the Western District of Pennsylvania in December 2001. US Airways objected to Garland’s claim. Because of the pending arbitration and the litigation in the district court, Garland’s proof of claim was continued every time it came up for hearing. On March 18, 2003, the plan was confirmed, under which allowable secured claims (except for a convenience class of small claims) would be satisfied by stock in the reorganized company, rather than by cash. The confirmation plan also included a discharge injunction of all claims filed as proofs of claim during the proceeding. Garland sought and was granted limited relief from that injunction to adjudicate his claims in the Western District of Pennsylvania.

*4 In September 2004, U.S. Airways filed its second bankruptcy petition. As a result, Garland’s second notice of appeal to the Third Circuit was stayed. On February 1, 2005, Garland filed a proof of claim in the second bankruptcy proceeding (Claim No. 3007). This second proof of claim was identical to the proof of claim filed in the first bankruptcy proceeding, and again requested \$17 million, although it gave a slightly different date for the alleged discrimination (two days’ difference). US Airways objected to this claim. Because U.S. Airways’s unresolved objections to claims filed in the first case, including Garland’s claim, were transferred to the second bankruptcy proceeding, the bankruptcy court had two identical proofs of claim filed by Garland pending before it.

A reorganization plan in the second case was confirmed on July 28, 2005. A status hearing on Garland’s second proof of claim was set for October 20, 2005, and continued to December 15, 2005, when oral argument of the claim was held.

On March 6, 2006, the bankruptcy court issued a Memorandum Opinion granting summary judgment in favor of U.S. Airways. In analyzing Garland’s two identical proofs of claim, the bankruptcy court concluded that the first claim (Claim No. 146), filed in the first bankruptcy case, must be disallowed as moot because confirmation of the plan of reorganization in the first bankruptcy case limited any recovery to a distribution of stock, and all rights to stock issued in the first bankruptcy case were cancelled by the confirmed plan in the second bankruptcy case. Garland’s claim in the second bankruptcy case (Claim No. 3007),

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was disallowed because it was essentially identical to Claim No. 146, which had arisen before the first bankruptcy petition was filed and, therefore, was discharged in the first bankruptcy case. The court also concluded that even if Garland's claims had not been disallowed as moot and/or discharged, they were barred by *res judicata* because the claims had been fully litigated before the U.S. Airways-ALPA System Board, the Western District of Pennsylvania, and the Third Circuit Court of Appeals, and final judgment had been entered dismissing his discrimination and retaliation claims. Lastly, the bankruptcy court concluded that there was no evidence that U.S. Airways's counsel had acted in an inappropriate manner, thus Garland's motion seeking sanctions against U.S. Airways's counsel was denied.^{FN5} Garland timely appealed this decision to this Court.

^{FN5}. The sanctions motion arose out of confusion over the date on which Garland's proof of claim would be argued. Garland alleged that U.S. Airways's counsel deliberately misinformed him that the matter had been continued to cause his absence and thereby jeopardize his claim.

II. Discussion

A. Standard of Review

A bankruptcy court's findings of fact may only be set aside by a district court exercising appellate review if they are clearly erroneous. Fed. R. Bankr.P. 8013. A district court's review of legal conclusions and mixed questions of law and fact, however, is *de novo*. In re Johnson, 960 F.2d 396, 399 (4th Cir.1992).

Motions for summary judgment raise mixed questions of law and fact. Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c), Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1985). In ruling on a motion for summary judgment, a court should accept the evidence of the nonmovant, and all justifiable inferences must be drawn in his favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

B. Res Judicata

*5 Garland's claims are clearly barred by *res judicata*. Under *res judicata*, or claim preclusion, "a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." Montana v. United States, 440 U.S. 147, 153 (1979); Meekins v. United Transp. Union, 946 F.2d 1054, 1057 (4th Cir.1991). The doctrine of *res judicata* bars claims when there is (1) a final judgment on the merits in an earlier suit; (2) the cause of action in both the earlier and the later suit are identical; and (3) the parties or their privies in the two suits are identical. Pension Benefit Guar. Corp. v. Beverley, 404 F.3d 243, 248 (4th Cir.2005); Meekins, 946 F.2d at 1057.

Garland's discrimination claims were fully litigated before the U.S. Airways-ALPA System Board during the arbitration proceeding. In that proceeding, the Board specifically found no evidence to support allegations of discrimination or retaliation surrounding U.S. Airways's decision to terminate Garland. Instead, it found that U.S. Airways had fired Garland because he no longer held FAA pilot certification and therefore could not legally be employed as one.

The Western District of Pennsylvania upheld the Board's conclusions and denied Garland's motion to vacate the arbitration ruling or reconsider its own rulings. The district court also rejected Garland's allegations of fraud in the arbitration process. The Third Circuit's dismissal of Garland's appeals rendered the district court's judgment on the merits of his claim a final judgment. Because the claims Garland unsuccessfully pursued in the arbitration and district court proceedings and those pursued in the bankruptcy court are the same, and the parties are the same, the bankruptcy court's entry of summary judgment in favor of U.S. Airways on the ground of *res judicata* was fully supported by the record, and correct as a matter of law.

C. Discrimination

Even if not barred by *res judicata*, Garland's claims of discrimination and retaliation under Title VII of the Civil Rights Act of 1964 (29 U.S.C. 7 2000e-3(a)) would fail because they are without merit. Garland alleges that he was subjected to a racially hostile environment and was terminated due to race discrimination and retaliation for filing a racial discrimination lawsuit in 1986.

Garland fails to state a *prima facie* case of race dis-

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crimination or retaliation because it is uncontested that he was not qualified for the position from which he was fired. To establish a *prima facie* case of discrimination, Garland must show that (1) he is a member of a protected class; (2) he was qualified for his job and his job performance was satisfactory; (3) he was fired; and (4) other employees who are not members of the protected class were retained under apparently similar circumstances. [Bryant v. Bell Atl. Md., Inc.](#), 288 F.3d 124 (4th Cir.2002). Thus, a crucial element of the *prima facie* case is that the plaintiff must be qualified for the position in question. [McDonnell Douglas Corp. v. Green](#), 411 U.S. 792 (1973).

*6 There is no question that Garland was not qualified for his position as a pilot: he could not lawfully fly a commercial airplane after he repeatedly failed proficiency tests and the FAA revoked his required license. US Airways was justified in terminating Garland at that point. Therefore, he fails to establish a *prima facie* case of discrimination.

Garland also failed to allege any facts sufficient to establish a hostile work environment. To state a claim of hostile environment, the hostility must be pervasive or severe enough “to alter the conditions of [the victim’s] employment and create an abusive working environment.” [Meritor Sav. Bank, FSB v. Vinson](#), 477 U.S. 57, 67 (1986). A plaintiff cannot rely upon casual, isolated, or sporadic incidents to support a claim of hostile work environment. See [Faragher v. City of Boca Raton](#), 524 U.S. 755, 788 (1998). Garland has alleged no facts such as harassing statements, conduct, or actions that would constitute racial harassment. He therefore fails to state a claim for hostile work environment.

Garland has also provided no evidence of retaliation. Lacking any direct evidence of retaliation, in analyzing whether Garland has made a sufficient claim for retaliation, the *McDonnell Douglas* burden shifting framework is the appropriate test. Under that framework, Garland must first make a *prima facie* case by showing that (1) he engaged in a protected activity; (2) U.S. Airways took an adverse employment action against him; and (3) a causal connection existed between the protected activity and the asserted adverse action. [Tinsey v. First Union Nat’l Bank](#), 155 F.3d 435, 443 (4th Cir.1998). Specifically, if Garland is able to show that his 1986 discrimination lawsuit in 1986

triggered his termination in 2001, a *prima facie* case would be made and the burden would then shift to U.S. Airways to articulate a legitimate, non-retaliatory reason for its action. If U.S. Airways carries this burden, then to overcome summary judgment Garland must present some evidence that the company’s proffered explanation is merely a pretext for retaliation.

Garland cannot establish the third element of the *prima facie* case, that is, causation, because the thirteen years between the protected activity (filing the discrimination lawsuit) and the adverse employment action is insufficient as a matter of law to establish causality. [Tinsey](#), 155 F.3d at 443. Moreover, even if Garland could establish a *prima facie* case of retaliation, he has not rebutted U.S. Airways’s legitimate, non-retaliatory reason for firing him; namely, that he was not legally certified to fly planes. Garland presents no evidence other than his own assertions that this decision was pretextual. In the Fourth Circuit, such declarations do not rebut a non-retaliatory explanation. [Goldberg v. Green and Co.](#), 836 F.2d 845, 848 (4th Cir.1988).^{FN6}

^{FN6}. Garland has made other claims and noted several issues on appeal that are also without merit. These include a claim for defamation and assertions that his claims are not subject to discharge in bankruptcy because they are for “willful and malicious injury;” that the debtor has admitted it has insurance that would cover his claims; that it was error for the bankruptcy court to dismiss Garland’s claim when no discovery had been conducted and no jury trial held; that a judicial lien was created by the 1991 decision in the Western District of Pennsylvania; that U.S. Airways has engaged in a continuing violation of his civil rights and the bankruptcy court abused its discretion by disallowing his claims; and that his claims were adversely affected by the order closing the first bankruptcy and thus the bankruptcy court abused its discretion by later determining that his claims were disallowed. None of these claims are supported by the record in any way.

D. Motion for Sanctions

Garland filed a motion for sanctions against counsel

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for U.S. Airways because of the miscommunication surrounding the schedule for hearing his claim. The bankruptcy court found that although there may have been some misunderstanding between counsel and Garland as to whether the claim objection *had been* or *was to be* continued, the outcome was the same in either event. Thus, no action was taken on his claim at the October 20 hearing and there was no evidence that counsel acted inappropriately. The bankruptcy court denied Garland's motion for sanctions. This decision will not be disturbed.

III. Conclusion

*7 For the reasons stated above, the decision of the bankruptcy court will be AFFIRMED.

A separate order consistent with this opinion will be entered.

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EXHIBIT E



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(Cite as: 2008 WL 5046596 (Bkrtcy.D.Ariz.))

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FOR PUBLICATION

United States Bankruptcy Court,
D. Arizona.
In re: FIRST MAGNUS FINANCIAL CORPORATION,
Debtor.
No. 4:07BK01578-JMM.

Oct. 16, 2008.

[John R. Clemency](#) and [Todd A. Burgess](#), Greenberg
Traurig, LLP, Phoenix, AZ, for First Magnus Financial
Corporation, Attorneys for Liquidating Trustee.

[James P.S. Leshaw](#), Greenberg Traurig, PA, Miami, FL,
for First Magnus Financial Corporation, Attorneys for
Liquidating Trustee.

[David Wm. Engelman](#) and [Bradley D. Pack](#), Engelman
Berger, P.C., Phoenix, AZ, for Dell Marketing, L.P.

[Sabrina L. Streusand](#), Streusand & Landon, LLP, Austin,
TX, for Dell Marketing, L.P.

[Sean P. O'Brien](#), Gust Rosenfeld, PLC, Phoenix, AZ, for
Official Committee of Unsecured Creditors.

[Walter H. Gilbert](#), Almquist & Gilbert, PC, Scottsdale, AZ,
for Cupertino Capital, LLC.

MEMORANDUM DECISION

[MARLAR](#), Bankruptcy J.

***1** Before the court is the motion of Dell Marketing, L.P.
("Dell") for administrative expense priority concerning
property sold to the Debtor and delivered within the 45-day
period preceding the filing of the chapter 11 bankruptcy
case on August 21, 2007 (Dkt.# 3778).

The facts are that the Debtor ordered, and Dell shipped,
products to the Debtor as follows:

•	Within 20 days prior to petition date (Declaration of Michael Keller)	\$94,535.45
•	Within 21 and 45 days prior to petition date (Declaration of Michael Keller)	79,700.62
		\$174,236.07

Dell promptly and timely made a reclamation demand
upon the Debtor, through counsel Sabrina Streusand, on
September 7, 2007.

The Debtor never returned any of Dell's product, and in-
stead surrendered it to one of its secured creditors,
JPMorgan Chase, N.A., which has disposed of said prop-
erty and credited sums received against its own obligations
due from Debtor. The Debtor benefitted from such sur-
render of products, subject to reclamation, by having the
proceeds reduce its obligation to JPMorgan Chase.

Ms. Streusand's letter effectively created an informal proof
of claim under the law, although the figures set forth in her
letter were later adjusted. See [In re Edelman](#), 237 B.R. 146,

[154 \(9th Cir. BAP1999\)](#). The total remained constant.
Other filings by Dell also put the Debtor on notice of Dell's
claims, both substantively and procedurally. Dell's claims
were all timely, and the Debtor's efforts to claim other
adequate means of notice were ineffective and legally
insufficient to bind Dell to any such deadlines claimed by
the Debtor.

In addition, Dell filed a timely proof of claim, which,
among other things, mentioned an administrative claim
under 7 503(b)(9).

LAW

A. *Product sold to Debtor within 20 days pre-petition*

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Dell is entitled to an administrative expense claim of \$94,535.45, pursuant to [11 U.S.C. § 503\(b\)\(9\)](#). The Debtor failed to rebut, by affidavit or argument, the *prima facie* case made by Dell in its moving papers. [FED. R. BANKR. P. 3001\(f\)](#). Dell's request for administrative expense status for \$94,535.45 will be GRANTED.

B. Product sold to Debtor between 21 and 45 days pre-petition

Section 546(c) gives a seller of goods the right to seek reclamation of goods sold to a debtor in the ordinary course of the seller's business and received by the insolvent debtor within 45-days pre-petition. But while Dell had that right, the Debtor did not comply with the demand, and instead turned the goods over to another competing creditor, JPMorgan Chase. Section 546(c) is not a creditor remedy statute, but instead describes limitations on a trustee's (or debtor-in-possession's) *avoiding* powers under § 544 (strongarm), § 545 (statutory liens), § 547 (preferences) and § 549 (post-petition transfers). *See, e.g., In re Dana Corp.*, 367 B.R. 409, 413-14 (Bankr.S.D.N.Y.2007). In other words, a trustee is subject to a seller's reclamation rights, and thus has to return the product if the reclamation is timely asserted by the selling creditor.

*2 But § 546(c) does not address what happens if a creditor's demand for reclamation is ignored, or if the reclamation seller does not promptly seek assistance from the court, and thereby forces the debtor to give back the sold product. The statute does not give such a seller/creditor an administrative claim, except to the extent it qualifies for one under [§ 503\(b\)\(9\)](#). [11 U.S.C. § 546\(c\)\(2\)](#). If its product is thereafter lost to a senior secured lender, as in this case, by "selling into" the blanket lien of a perfected senior lienholder, or if the Debtor simply ignores the demand, the creditor may lose its rights, as here.

What then, is the creditor left with? The answer is: Only an unsecured claim (or a claim against the secured lender for conversion), unless it can establish a benefit to the estate to qualify as an administrative expense under [§ 503\(b\)\(1\)](#). *See, e.g., In re Pittsburgh-Canfield Corp.*, 309 B.R. 277, 286 (6th Cir. BAP2004) (reclaiming seller is entitled to a lien or administrative expense to the full extent of the seller's valid reclamation claim under state law); VERNON'S [TEX. BUS. & COM.CODE ANN. § 2.702\(c\)](#) (Thompson Reuters/West 2008) (seller's right to reclaim is subject to rights of a lien creditor).

Here no such benefit has been established by Dell, sufficient to qualify as an administrative expense for the product shipped between 21 and 45 days, pre-petition, and no evidence was presented which would support such a claim. *See In re Abercrombie*, 139 F.3d 755, 757 (9th Cir.1998) (administrative expense claim must arise from postpetition transaction and directly and substantially benefit the estate).

Accordingly, Dell's request for administrative expense status of \$79,700.62 will be DENIED. Its claim for this amount is unsecured.

A separate order will be entered.

Bkrcty.D.Ariz.,2008.
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EXHIBIT F



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United States Bankruptcy Court, M.D. North Carolina.

In re: PLUMA, INC., Debtor.
No. 99-11104C-11G.

July 21, 2000.

MEMORANDUM OPINION

[STOCKS](#), Bankruptcy J.

*1 This case came before the court on June 13, 2000, for hearing upon an objection by the Debtor, Pluma, Inc., to a claim by Premium Wear, Inc., for a secured claim or a priority claim in the amount of \$54,203.28 based upon reclamation rights under 7 546(c). R. Bradford Leggett appeared on behalf of the Debtor, K. Lane Klotzberger appeared on behalf of Premium Wear, Inc., David M. Grogan appeared on behalf of the Unsecured Creditors' Committee, and Douglas R. Ghidina appeared on behalf of the Bank of America and the Bank Group.

NATURE OF THE CONTROVERSY

The Debtor contends that Premium Wear, Inc. is not entitled to any relief under 7 546(c) and therefore is not entitled to either secured or priority status.

FACTS

1. Prior to ceasing operations, Debtor was a vertically integrated manufacturer and distributor of fleece and jersey active wear.

2. In May 1997, Debtor purchased various assets and assumed various liabilities from Stardust Corporation, a Wisconsin corporation, which expanded Debtor's nationwide wholesale distributorship into undecorated sportswear. The purchased assets, which included real and personal property comprising a manufacturing facility in Wisconsin, were operated as a separate division called the Stardust Division. It is undisputed that Stardust was sufficiently integrated with Pluma

after the purchase for Pluma to be liable for all of Stardust's debts and obligations arising thereafter.

3. Debtor's Stardust Division purchased shirts in large quantities from Premium Wear, which is located in Minnesota. At the time of Debtor's petition, Stardust owed Premium Wear \$159,435.16 as a result of multiple shipments of clothing for which no payment had been made. Of these shipments, four were delivered on May 13, 1999, and had a total contract price of \$54,435.16. These four shipments were comprised of a total of 4,440 Munsingwear shirts.

4. Debtor filed a voluntary petition for relief under Chapter 11 on May 14, 1999.

5. Upon learning of Debtor's filing, Premium Wear mailed on May 21, 1999, written demand for reclamation of the 4,400 shirts delivered on May 13th. The letter demanded that Stardust retain the shirts until Premium Wear secured possession thereof. Authority for reclamation cited in the letter was [11 U.S.C. 7 546\(c\)](#), [Wis. Stat. 7 402.702](#), and [Minn.Stat. 7 336.2-702](#).

6. Premium Wear filed a proof of claim in this case on July 20, 1999, in the amount of \$159,435.16. Of that amount, Premium Wear alleged that \$54,203.28 should be allowed as a secured claim because of its reclamation rights related to the 4,400 shirts.

7. There is no evidence that Premium Wear had any contact with Stardust or Pluma during the interval between the demand letter on May 21, 1999, and the filing of the proof of claim on July 20, 1999.

8. The Debtor objected to Premium Wear's claim to the extent that the claim was asserted as secured or priority based upon reclamation under [7 546\(c\)](#).

9. Premium Wear filed a response to Debtor's objection on March 2, 2000, followed by a second response on April 27, 2000.

PROCEDURAL POSTURE

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*2 On June 13, 2000, a hearing was held regarding Premium Wear's claim and the Debtor's objection. At the hearing, the parties agreed that the only documents filed with the Court regarding Premium Wear's claim were Premium Wear's proof of claim, Debtor's objection to the claim and Premium Wear's two responses to Debtor's objection, which included attached documentation. The only evidence offered at the hearing were the attachments to the Premium Wear response and a copy of an affidavit from Michael P. Coaty, counsel for Premium Wear in Wisconsin, regarding the fact that various bankruptcy notices had been sent to Premium Wear's lockbox in Minnesota rather than to him despite his having filed a notice of appearance on September 8, 1999. Debtor objected to paragraph six of the affidavit, and the objection was sustained. The original of this affidavit was filed with the court on June 27, 2000, and has been considered by the court along with Premium Wear's proof of claim and responses.

DISCUSSION

As an initial matter, it was agreed by the parties that none of the shirts remain in the possession of the Debtor. There being no actual shirts remaining in Debtor's possession, Premium Wear conceded that actually reclaiming the shirts is foreclosed. Premium Wear argued, however, that it should nonetheless be granted a priority claim under [7 503\(b\)](#). Premium Wear claims to have fully complied with both Minnesota and Wisconsin state law ^{FN1} and to have a right to reclamation under state law. In its second Brief in Support of Claim, Premium Wear states that "[Section 546\(c\) of the Bankruptcy Code](#) provides that a party with a state-law right to reclamation may assert that right in bankruptcy, provided that the seller's demand for reclamation was in writing." Premium Wear then refers the Court to [7 546\(c\)\(2\)](#), which states that when a court denies "reclamation to a seller with such a right of reclamation that has made such a demand," the court must provide the seller with either a priority claim or a lien on property. ^{FN2} According to Premium Wear, since it has been denied this state-law reclamation right, the court must provide it with a priority claim pursuant to [7 546\(c\)\(2\)](#).

^{FN1} [Minn.Stat. Ann. 7 336.2-702](#) (West 2000) and [Wis. Stat. Ann. 7 402.702](#) (West 2000) respectively, both of which are based on Article 2, Section 702 of the Model Uni-

form Commercial Code, which addresses reclamation rights and insolvent buyers.

[FN2](#). [Section 546](#) states:

(c) Except as provided in subsection (d) of this section, the rights and powers of a trustee under sections 544(a), 545, 547, and 549 of this title are subject to any statutory or common-law right of a seller of goods that has sold goods to the debtor, in the ordinary course of such seller's business, to reclaim such goods if the debtor has received such goods while insolvent, but-

(1) such seller may not reclaim any such goods unless such seller demands in writing reclamation of such goods-

(A) before 10 days after receipt of such goods by the debtor; or

(B) is such 10-day period expires after the commencement of the case, before 20 days after receipt of such goods by the debtor; and

(2) the court may deny reclamation to a seller with such a right of reclamation that has made such a demand only if the court-

(A) grants the claim of such a seller priority as a claim of a kind specified in section 503(b) of this title; or

(B) secures such claim by a lien.

In opposition to this argument, the Debtor maintains that [7 546\(c\)](#) requires that a right to reclamation exist and that Premium Wear had the burden of proving it had a right to reclamation, which it failed to do. The court finds Debtor's arguments to be correct and decisive in this matter.

It is well settled that [7 546\(c\)](#) provides the sole remedy for a seller seeking to reclaim goods from a debtor in bankruptcy. See [In re Julien Co.](#), 44 F.3d 426, 432 (6th Cir.1995); [Rawson Food Serv., Inc.](#), 846 F.2d 1343, 1346 (11th Cir.1988); [In re Morken](#), 182 B.R. 1007,

Not Reported in B.R., 2000 WL 33673751 (Bkrcty.M.D.N.C.)
(Cite as: 2000 WL 33673751 (Bkrcty.M.D.N.C.))

1014 (Bankr.D.Minn.1995); In re Video King of Ill., Inc., 100 B.R. 1008, 1013 (Bankr.N.D.Ill.1989). Courts have consistently held that any grant of lien or priority claim under 7 546(c)(2) is conditioned upon the claiming party first establishing a right to reclamation under 7 546(c). Since 7 546(c)(2) provides for a lien or priority claim only when the court has denied a *valid* claim of reclamation under 7 546(c), establishing a 7 546(c) right to reclamation is a precondition for any lien or priority claim that 7 546(c) provides as an alternative remedy. See Morken, 182 B.R. at 1018; Video King, 100 B.R. at 1016. One of the prerequisites for establishing a 546(c) right to reclamation is that the reclaiming party must have a common law or statutory right to reclamation. See, e.g., Rawson, 846 F.2d at 1347; In re McLouth Steel Prods. Corp., 213 B.R. 978, 983 (E.D.Mich.1997); In re Arlco, Inc., 239 B.R. 261, 266 (Bankr.S.D.N.Y.1999).

*3 While Premium Wear has stated in its briefs and at the hearing that it has complied with state law and has a state law right of reclamation, these statements are conclusory and not supported by the evidence. The court accepts that Premium Wear did abide by those requirements listed in its briefs, namely that demand was made within ten days of Debtor's receipt of the goods, the goods were sold on credit, and that the Debtor was insolvent at the time of receipt (although no evidence was presented on this latter issue). However, the three requirements listed by Premium Wear do not comprise all of the requirements for proving a state law right to reclamation. Instead, the cases impose four requirements for obtaining treatment under 7 546(c) as follows:

- (1) the goods must have been sold in the ordinary course of business;
- (2) the goods must have been received by the buyer while insolvent;
- (3) a written demand for reclamation must have been made within ten days of receipt of the goods by buyer; and
- (4) the buyer must have been in possession of the goods at the time the buyer received the demand or the goods not be in the hands of a good faith purchaser or buyer in the ordinary course of business.

See, e.g., In re Adventist Living Centers, Inc., 52 F.3d 159, 162 (7th Cir.1995); In re Pester Refining Co., 964 F.2d 842, 845 (8th Cir.1992); Video King, 100 B.R. at 1013. Other courts use slightly different variations on this list, but all still require that the goods be in the possession of the buyer at the time demand is made. See, e.g., Rawson, 846 F.2d at 1347; Vanco Trading, Inc. v. Monheit, 1999 WL 464531 (D. Conn. June 17, 1999); McLouth, 213 B.R. at 983; Arlco, 239 B.R. at 266; In re Victory Markets, Inc., 212 B.R. 738, 741 (Bankr.N.D.N.Y.1997). This is because reclamation is an *in rem* right that must be invoked immediately and prior to disposition of the goods. See In re Crofton & Sons, Inc., 139 B.R. 567, 569 (M.D.Fla.1992); Action Indus., Inc. v. Dixie Enters., Inc., 22 B.R. 855, 859 (Bankr.S.D.Ohio 1982).

The requirement that the goods still be in the possession of the buyer at the time demand is made is a state law requirement-not an additional requirement of the Bankruptcy Code. See In re Landy Beef Co., 30 B.R. 19, 20 n. 4 (Bankr.D.Mass.1983); In re Flagstaff Food Serv. Corp., 14 B.R. 462, 465 (Bankr.S.D.N.Y.1981); 5 *Collier on Bankruptcy* h 546.04[2][a] (Lawrence P. King et al. eds., 15th ed. rev.2000).

The prevailing rule is that the reclaiming party has the burden of proving that the goods were in the possession of the buyer at the time demand was received by the buyer. See Adventist, 52 F.3d at 163 (“ ‘The seller in a reclamation case bears the burden of proving that the debtor possessed the goods when it received the reclamation demand. This is a fairly stringent requirement because a seller's evidence must indicate that this critical fact on which its recover depends is true, and not merely that it is possible it is so.’ ”) (quoting In re Flagstaff Food Serv. Corp., 56 B.R. 899, 908 (Bankr.S.D.N.Y.1986)); Rawson, 846 F.2d at 1348; Arlco, 239 B.R. at 266; Victory Markets, 212 B.R. at 741. The burden is to prove by the preponderance of the evidence. See Adventist, 52 F.3d at 162; Arlco, 239 B.R. at 266; Video King, 100 B.R. at 1013. There is no presumption that the goods remain in the possession of the debtor just because delivery has been made. See Adventist, 52 F.3d at 162; Rawson, 846 F.2d at 348.

*4 In the present case, Premium Wear failed to provide any evidence that the shirts in question were still in the Debtor's possession at the time written demand was made on May 21, 1999. Premium Wear thus

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(Cite as: 2000 WL 33673751 (Bkrtcy.M.D.N.C.))

failed to meet its burden of proving a right to reclaim any goods under [7 546\(c\)](#) of the Code.

A reclaiming party that fails to prove that goods were in the possession of a bankruptcy debtor at the time demand was made fails to prove a state law right to reclamation and therefore fails to meet the most basic prerequisite to [7 546\(c\)](#) remedies. Since Premium Wear has failed to establish that it had a state law right to reclamation, this court's denial of Premium Wear's right to reclamation is not a denial of a *valid* right of reclamation under [7 546\(c\)](#), and [7 546\(c\)\(2\)](#) therefore is not called into play. See [Pester, 964 F.2d at 847](#). As a result, Premium Wear's request for a priority claim pursuant to [7 546\(c\)\(2\)](#) must be denied. Though Premium Wear did not raise the issue, any claim for a lien pursuant to [7 546\(c\)\(2\)\(A\)](#) would be denied on the same grounds.^{FN3}

[FN3](#). Because a determination as to whether or not the Bank Group had a perfected security interest in the inventory of Stardust does not affect the outcome of the issue at hand, namely whether or not Premium Wear should be allowed a secured or priority claim in the amount of \$54,203.28, the court need not address that question.

CONCLUSION

In accordance with the foregoing, an order will be entered contemporaneously herewith denying the claim of Premium Wear, Inc. to the extent that it seeks secured or priority status and allowing a general unsecured claim in the amount of \$159,435.16.

Bkrtcy.M.D.N.C.,2000.

In re Pluma, Inc.

Not Reported in B.R., 2000 WL 33673751
(Bkrtcy.M.D.N.C.)

END OF DOCUMENT

EXHIBIT G

Brian P. Leitch, Esq.
Daniel M. Lewis, Esq.
Michael J. Canning, Esq.
ARNOLD & PORTER LLP

370 Seventeenth Street, Suite 4500
Denver, Colorado 80202
(303) 863-1000

- and -

555 Twelfth Street, NW
Washington, DC 20004
(202) 942-5000

- and -

399 Park Avenue
New York, New York 10022
(212) 715-1000

Lawrence E. Rifken, Esq. (VSB No. 29037)
Douglas M. Foley, Esq. (VSB No. 34364)
David I. Swan, Esq.
McGUIREWOODS LLP
1750 Tysons Boulevard, Suite 1800
McLean, Virginia 22102-4215
(703) 712-5000

Counsel to the Debtors and Debtors-in-Possession

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

In re:)	
	)	Case No. 04-13819
	)	Jointly Administered
US AIRWAYS, INC., <u>et al.</u> , ¹	)	Chapter 11
	)	Hon. Stephen S. Mitchell
Debtors.)	
_____)	

NOTE: THE FORM OF THE ORDER HAS BEEN MODIFIED BY THE COURT.

**ORDER GRANTING MOTION TO AUTHORIZE THE ESTABLISHMENT AND
IMPLEMENTATION OF EXCLUSIVE, GLOBAL PROCEDURES FOR THE
RECONCILIATION AND TREATMENT OF RECLAMATION CLAIMS ASSERTED
AGAINST THE DEBTORS**

Upon the motion dated September 12, 2004 (the "Motion")² wherein the Debtors
and debtors-in-possession in the above-captioned cases moved this Court for an order (i)

¹ The Debtors are the following entities: US Airways, Inc., US Airways Group, Inc., PSA Airlines, Inc., Piedmont Airlines, Inc. and Material Services Company, Inc.

² Unless otherwise defined herein, all capitalized terms shall have the meaning ascribed to them in the Motion.

establishing and implementing exclusive, global procedures for the reconciliation and treatment of all Reclamation Claims asserted against the Debtors by or on behalf of the Debtors' creditors or other parties and (ii) granting such other and further relief as is just and proper, the Court finds that (i) it has jurisdiction over the matters raised in the Motion pursuant to 28 U.S.C. §§ 157 and 1334, (ii) this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2), (iii) the relief requested in the Motion is in the best interests of the Debtors, their estates, and their creditors, (iv) proper and adequate notice of the Motion and the hearing thereon has been given and that no other or further notice is necessary, and (v) good and sufficient cause exists for the granting of the relief requested in the Motion after having given due deliberation upon the Motion and all of the proceedings had before the Court in connection with the Motion. Therefore,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

1. The Motion is GRANTED.
2. The Debtors should be, and hereby are, authorized, pursuant to sections 105(a), 503(b), 507(a), and 546 of the Bankruptcy Code, Federal Bankruptcy Rule 9019(b), and section 2-702 of the UCC, to reconcile and resolve all Reclamation Claims in accordance with the exclusive Reclamation Procedures set forth below, which are hereby approved and authorized in their entirety:

RECLAMATION PROCEDURES

(1) Reclamation Demands

(a) All Sellers seeking to reclaim Goods from the Debtors will be required to submit a written demand to US Airways Group, Inc., 2345 Crystal Drive, Arlington, Virginia 22227 (Attn: Anita Beier, Senior Vice President and Controller) with copies to McGuireWoods LLP, 1750 Tysons Boulevard, Suite 1800, McLean, Virginia 22102-4215 (Attn: Lawrence E. Rifken, Esq.) and FTI Consulting, Inc., 622 Third Avenue, 31st Floor, New York, New York, 10017 (Attn: Scott Rinaldi), so that the demand is received by each of the above addressees (a "Reclamation Demand"):

(i) before 10 days after the receipt of such Goods by the Debtors; or

(ii) if such 10-day period expires after the Petition Date, before 20 days after the receipt of such Goods by the Debtors, unless, the period of time specified in subparagraph (a)(i) above or this subparagraph (a)(ii) expires on a day that is not a business day, in which case such period shall expire on the next business day.

(b) The Reclamation Demand must specifically set forth the Goods for which reclamation is being sought and the basis for the Reclamation Claim, and must be accompanied by the applicable invoice(s) relating to the Goods and documentation establishing the delivery of the Goods to the Debtor(s).

(c) Any Seller who fails to timely submit a Reclamation Demand pursuant to section 546 of the Bankruptcy Code and the requirements set forth above shall be deemed to have forever waived any and all of its rights with respect to any alleged Reclamation Claim, including, but not limited to, its right to any payment on account of any alleged Reclamation Claim.

(2) The Statement of Reclamation

(a) Within forty-five (45) days after the Petition Date or the receipt of a timely and otherwise validly submitted Reclamation Demand, whichever is later, the Debtors will provide the Seller who is the proponent of such Reclamation Demand with a copy of the Reclamation Order and a statement of reclamation (the "Statement of Reclamation" or the "Statement").

(b) The Statement of Reclamation will set forth the extent, if any, to which and the bases upon which the Debtors believe the underlying Reclamation Claim is not legally valid and the portion, if any, of the Reclamation Claim that the Debtors believe may be legally valid (the "Reconciled Reclamation Claim"). In addition, the Statement shall identify any defenses that the Debtors choose to reserve, including, but not limited to, the defenses set forth in subparagraph 5(a) below (the "Reserved Defenses"), notwithstanding any payment of the Reconciled Reclamation Claim.

(c) Sellers who agree with and wish to assent to the Reconciled Reclamation Claim as set forth in the Statement of Reclamation may indicate such assent on the Statement of Reclamation and return the Statement within sixty (60) days after the date of the Statement of Reclamation (the "Reconciliation Deadline") to US Airways Group, Inc., 2345 Crystal Drive, Arlington, Virginia 22227 (Attn: Anita Beier, Senior Vice President and Controller), or such other addressee as set forth in such Statement, with copies to McGuireWoods LLP, 1750 Tysons Boulevard, Suite 1800, McLean, Virginia 22102-4215 (Attn: Lawrence E. Rifken, Esq.) and FTI Consulting, Inc., 622 Third Avenue, 31st Floor, New York, New York, 10017 (Attn: Scott Rinaldi).

(d) Sellers who do not agree with the Reconciled Reclamation Claim as set forth in the Statement of Reclamation and wish to dissent thereto (the "Dissenting Sellers") must indicate such dissent on the Statement of Reclamation and return the Statement by the Reconciliation Deadline to all of the addressees identified above in subparagraph 2(c) of these Reclamation Procedures. A Statement of Reclamation returned under this subparagraph must be accompanied by:

(i) a copy of the Reclamation Demand together with any evidence of the date such Reclamation Demand was sent to and received by the Debtors;

(ii) the identity of the Debtor(s) that ordered the Goods and the identity of the Seller from whom the Goods were ordered;

(iii) any evidence demonstrating when the Goods were shipped and received;

(iv) copies of the Debtors' and the Seller's purchase orders and invoices, respectively, together with a description of the Goods shipped; and

(v) a statement identifying which information on the Debtors' Statement of Reclamation is incorrect, specifying the correct information, and stating any legal basis for the objection.

(e) Any Seller who (i) returns the Statement of Reclamation by the Reconciliation Deadline and indicates its dissent but fails to materially comply with subparagraph (2)(d) above (as determined by the Debtors in good faith), (ii) returns the Statement of Reclamation by the Reconciliation Deadline but fails to indicate its assent or dissent, or (iii) fails to return the Statement of Reclamation by the Reconciliation Deadline, shall be deemed to have (i) waived its right to object to the proposed treatment and allowed amount of the Reconciled Reclamation Claim, if any, and (ii) assented to the Reconciled Reclamation Claim, if any, unless the Court orders otherwise.

(3) Fixing of Reclamation Claims

(a) Each Reclamation Claim of any Seller who (i) returns the Statement of Reclamation by the Reconciliation Deadline and indicates its assent to the Reconciled Reclamation Claim as set forth in the Statement of Reclamation, (ii) returns the Statement of Reclamation by the Reconciliation Deadline and indicates its dissent but fails to materially comply with subparagraph (2)(d) above (as determined by the Debtors in good faith), (iii) returns the Statement of Reclamation by the Reconciliation Deadline but fails to indicate either its assent or dissent, or (iv) fails to return the Statement of Reclamation by the Reconciliation Deadline, will be deemed an Allowed Reclamation Claim in the amount of the Reconciled Reclamation Claim, if any.

(b) The Debtors are authorized to negotiate with all Dissenting Sellers and to adjust the Reconciled Reclamation Claim either upward or downward to reach an agreement regarding a Dissenting Seller's Reclamation Claim. The Debtors are also authorized to include any Reserved Defenses as part of any such agreement. In the event that the Debtors and a Dissenting Seller are able to settle on the amount and/or treatment of the Dissenting Seller's Reclamation Claim, the Reclamation Claim will be deemed an Allowed Reclamation Claim in the settled amount.

(c) In the event that no consensual resolution of a Dissenting Seller's Reclamation Claim is reached within sixty (60) days after the Reconciliation Deadline (or such later date as the parties may mutually agree), the Debtors shall file a motion for determination of the Dissenting Seller's Reclamation Claim and set such motion for a hearing before the Court at the next regularly scheduled omnibus hearing occurring more than twenty (20) days after the filing of the motion for determination, unless another hearing date is mutually agreed to by the parties or ordered by the Court (the "Determination Hearing"). The Dissenting Seller's Reclamation Claim, if any, shall be deemed an Allowed Reclamation Claim as fixed by the Court in the Determination Hearing or as mutually agreed to by the Debtors and the Dissenting Seller prior to a determination by the Court in the Determination Hearing.

(4) Treatment of Allowed Reclamation Claims

(a) The Debtors may, but are not obligated to, at any point in time satisfy in full any Reclamation Claim or Allowed Reclamation Claim by making the Goods at issue available for pick-up by the Seller or Dissenting Seller pursuant to section 546(g) of the Bankruptcy Code without any further notice or order of the Court.

(b) All Allowed Reclamation Claims for which the Debtors choose not to make the Goods available for pick-up in accordance with subparagraph 4(a) above shall be paid (i) in full as administrative expense priority claims pursuant to a plan of reorganization confirmed by the Court in the Debtors' bankruptcy cases, (ii) in accordance with the provisions of the Bankruptcy Code in the event of a liquidation of the Debtors, or (iii) in whole or in part and earlier than the time period specified in (i) or (ii) of this subparagraph in the Debtors' business judgment.

(5) The Debtors' Reserved Defenses

(a) The Debtors' Reserved Defenses, as referenced in subparagraph (2)(b) above, shall include, but not be limited to, the following:

(i) a seller has no right to reclaim goods delivered to a debtor that was not insolvent when the goods were delivered;

(ii) a seller has a right to reclaim only those goods delivered without the seller's knowledge of the buyer's insolvency;

(iii) a seller has a right to reclaim only those goods for which it made a reclamation demand before 10 days after the buyer's receipt of the goods or, if such 10-day period expires after the commencement of the bankruptcy case(s), before 20 days after such receipt, pursuant to subparagraph 1(a) above;

(iv) the reclamation demand must be in writing;

(v) a seller has a right to reclaim only those goods that are specifically identifiable and not commingled with or altered by other goods (i) to create a finished product or a manufacturing process and/or (ii) in the process of providing the Debtors' transportation services;

(vi) a seller may reclaim goods only to the extent that the goods were in the possession of the debtor at the time the debtor received the reclamation demand;

(vii) a seller has no right to reclaim goods that have been transferred to a "buyer in the ordinary course" or a "good faith purchaser"; and

(viii) a seller may reclaim goods only to the extent that the goods are not subject to the superior rights or interests of any secured lender or creditor.

(6) Exclusivity of Remedy

(a) The foregoing Reclamation Procedures are the sole and exclusive method for the resolution and payment of all Reclamation Claims asserted against the Debtors. All Sellers are prohibited from seeking any other means for the resolution of and/or treatment for their Reclamation Claims other than that which is permitted by these Reclamation Procedures.

(b) All parties are prohibited from commencing adversary proceedings against the Debtors in connection with any Reclamation Claims. All adversary proceedings in these cases relating to Reclamation Claims, whether currently pending or initiated in the future, except those proceedings initiated by the Debtors in accordance with these Reclamation Procedures, are stayed and the claims asserted therein shall be reconciled and resolved exclusively pursuant to the Reclamation Procedures set forth herein, unless otherwise ordered by the Court.

(7) Miscellaneous Terms and Conditions

(a) The Debtors are authorized to reconcile and pay Allowed Reclamation Claims pursuant to the Reclamation Procedures without the need for a further order of this Court. In the event that an Allowed Reclamation Claim is paid, in whole or in part, earlier than the effective date of a confirmed plan of

reorganization in the Debtors' bankruptcy cases (the "Effective Date"), any such payments shall be subject to any Reserved Defenses. The Reserved Defenses shall be deemed waived by the Debtors on the earlier of the Effective Date or the date that is one year following the last payment of an Allowed Reclamation Claim, except as may be otherwise provided by the mutual agreement of the parties or by order of the Court.

(b) The Debtors' payment of an Allowed Reclamation Claim pursuant to the Reclamation Procedures shall constitute a waiver, release, discharge, and satisfaction of any and all rights and claims, including, but not limited to, reclamation rights and/or claims, that the holder of the Allowed Reclamation Claim has ever had, or hereafter can, shall, or may have, against the Debtors arising directly or indirectly from, or in connection with, the Goods constituting the basis for the Allowed Reclamation Claim.

(c) Neither anything contained in the Reclamation Procedures nor any of the transactions contemplated thereby, including, but not limited to, the Debtors' payment of any Allowed Reclamation Claim, shall create a waiver by the Debtors of any claims that they may have against any vendor relating to any preferential or fraudulent transfers, or other potential claims, counterclaims, or offsets with respect to said vendors. The Debtors expressly reserve their rights to pursue such claims and any and all other claims that they may seek to advance against any vendor in the future. The Debtors specifically reserve the right to object on any grounds to any proof of claim filed by or on behalf of any of the Sellers.

(d) Nothing contained herein shall be deemed an admission as to the solvency or insolvency of the Debtors at any relevant time, and each holder of an Allowed Reclamation Claim, by accepting payment in accordance with the Reclamation Procedures, shall be deemed to warrant that it has not assigned any of its rights to its Reclamation Claim.

3. Consistent with paragraph 6(b) of the Reclamation Procedures, all parties are hereby prohibited from commencing adversary proceedings against the Debtors in connection with any Reclamation Claims. All adversary proceedings in these cases relating to Reclamation Claims, whether currently pending or initiated in the future, except those proceedings initiated by the Debtors in accordance with these Reclamation Procedures, are hereby stayed and the claims asserted therein shall be reconciled and resolved exclusively pursuant to the Reclamation Procedures set forth herein, unless otherwise ordered by this Court.

4. The entry of this Order is conditional. Any party in interest may object to the entry of this Order within ten (10) days after the date of entry, except that the United States Trustee and any statutory committee appointed in these cases shall have fifteen (15) days after the date of entry or ***ten (10) days after the appointment of the committee, which is later,*** to object. If any such objection is timely filed, the objection shall be heard at the next regularly-scheduled omnibus hearing date. At the hearing, the Court may vacate this Order, modify it, or make it final. If no timely objection is filed, this Order shall become final at the conclusion of such objection period without further order of this Court. This Order shall remain in effect notwithstanding any objection until further order of this Court. The modification or vacation of this Order shall not impair any action taken pursuant to it prior to its modification or vacation.

Dated: Alexandria, Virginia
_____, 2004

UNITED STATES BANKRUPTCY JUDGE

WE ASK FOR THIS:

Brian P. Leitch, Esq.
Daniel M. Lewis, Esq.
Michael J. Canning, Esq.
ARNOLD & PORTER LLP

370 Seventeenth Street, Suite 4500
Denver, Colorado 80202
(303) 863-1000

- and -

555 Twelfth Street, NW
Washington, DC 20004
(202) 942-5000

- and -

399 Park Avenue
New York, New York 10022
(212) 715-1000

- and -

/s/ Lawrence E. Rifken

Lawrence E. Rifken, Esq. (VSB No. 29037)
Douglas M. Foley, Esq. (VSB No. 34364)
David I. Swan, Esq.
McGUIREWOODS LLP
1750 Tysons Boulevard, Suite 1800
McLean, Virginia 22102-4215
(703) 712-5000

*Counsel to the Debtors and
Debtors-in-Possession*

\\FIN\202726

EXHIBIT H

John Wm. Butler, Jr.
John K. Lyons
SKADDEN, ARPS, SLATE, MEAGHER
& FLOM (ILLINOIS)
333 West Wacker Drive, Suite 2100
Chicago, Illinois 60606-1285
(312) 407-0700

Lawrence E. Rifken (VSB No. 29037)
McGUIREWOODS LLP
1750 Tysons Boulevard, Suite 1800
McLean, Virginia 22102-4215
(703) 712-5000

Attorneys for Debtors and Debtors-in-Possession

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

In re:)	
	)	Case No. 02-83984-SSM
US AIRWAYS GROUP, INC., <u>et al.</u>,	)	Jointly Administered
	)	Chapter 11
Debtors.	)	Hon. Stephen S. Mitchell
)	

**ORDER PURSUANT TO 11 U.S.C. §§ 105, 362, 503 AND 546
(I) PROVIDING ADMINISTRATIVE EXPENSE TREATMENT
FOR CERTAIN HOLDERS OF VALID RECLAMATION CLAIMS
AND (II) ESTABLISHING PROCEDURES FOR
RESOLUTION AND PAYMENT OF RECLAMATION CLAIMS**

Upon the motion dated August 11, 2002 (the “Motion”),¹ wherein US Airways
Group, Inc. (“Group”) and seven of its subsidiaries and affiliates (the “Affiliate

¹ Unless otherwise defined herein, all capitalized terms shall have the meaning ascribed to them in the Motion.

Debtors”),² debtors and debtors-in-possession in the above-captioned cases (collectively, the “Debtors”), moved this Court for an order pursuant to sections 105, 362, 503 and 546 of the Bankruptcy Code authorizing the Debtors to establish procedures for the resolution and payment of reclamation claims; the Court finds that (i) it has jurisdiction over the matters raised in the Motion pursuant to 28 U.S.C. §§ 157 and 1334; (ii) this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); (iii) the relief requested in the Motion is in the best interests of the Debtors, their estates and their creditors; (iv) proper and adequate notice of the Motion and the hearing thereon has been given and that no other or further notice is necessary; and (v) upon the record herein after due deliberation thereon good and sufficient cause exists for the granting of the relief as set forth herein,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. The Motion is GRANTED.
2. The Debtors be, and hereby are, authorized, pursuant to sections 105, 362, 503 and 546 of the Bankruptcy Code, to resolve Reclamation Claims in accordance with the Reclamation Procedures set forth below:

² The Debtors are the following entities: US Airways Group, Inc., US Airways, Inc., Allegheny Airlines, Inc., PSA Airlines, Inc., Piedmont Airlines, Inc., MidAtlantic Airways, Inc., US Airways Leasing and Sales, Inc. and Material Services Company, Inc.

RECLAMATION PROCEDURES

(a) Reclamation Demands

(i) All persons (collectively, the “Sellers”) seeking to reclaim Goods from the Debtors shall be required to submit a demand (a “Reclamation Demand”):

(1) before 10 days after receipt of such Goods by the Debtors; or

(2) if such 10-day period expires after the Petition Date, before 20 days after receipt of such Goods by the Debtors.

(ii) Such a Reclamation Demand must set forth in specificity the goods for which reclamation is sought and the basis for the Reclamation Claim.

(iii) Any Seller who fails to timely submit a Reclamation Demand pursuant to section 546 of the Bankruptcy Code shall be deemed to have waived its right to payment on any purported Reclamation Claim.

(b) The Statement of Reclamation

(i) Within forty-five (45) days after the Petition Date or receipt of a timely Reclamation Demand, whichever is later, the Debtors shall provide the Seller with a copy of the Reclamation Order and a statement of reclamation (the “Statement of Reclamation” or the “Statement”).

(ii) The Statement of Reclamation shall set forth the extent and basis, if any, upon which the Debtors believe the underlying Reclamation Claim is not legally valid (the “Reconciled Reclamation Claim”).

(iii) Sellers who are in agreement with the Reconciled Reclamation Claim as contained in the Statement of Reclamation may indicate such assent on the Statement of Reclamation and return the Statement by 60 days after date of Statement of Reclamation (the “Reconciliation Deadline”) to the

Debtors' representative as set forth in such statement with copies to Skadden, Arps, Slate, Meagher & Flom (Illinois), 333 West Wacker Drive, Suite 2100, Chicago, Illinois 60606 (Attn: John Wm. Butler, Jr., Esq., and John K. Lyons, Esq.) and McGuireWoods LLP, 1750 Tysons Boulevard, Suite 1800, McLean, Virginia 22102-4215 (Attn: Lawrence E. Rifken).

(iv) Sellers who are in disagreement with the Reconciled Reclamation Claim as contained in the Statement of Reclamation (the "Dissenting Sellers") must indicate such dissent on the Statement of Reclamation and return the Statement by the Reconciliation Deadline to the entities and at the addresses identified in subparagraph (iii) of these Procedures, above. A Statement of Reclamation returned under this subparagraph must be accompanied by:

(1) a copy of the Reclamation Demand together with any evidence of the date such Reclamation Demand was sent and received;

(2) the identity of the Debtor that ordered the products and the identity of the Seller from whom the Goods were ordered;

(3) any evidence demonstrating when the Goods were shipped and received;

(4) copies of the respective Debtor's and Seller's purchase orders and invoices, together with a description of the Goods shipped; and

(5) a statement identifying which information on the Debtors' Statement of Reclamation is incorrect, specifying the correct information and stating any legal basis for the objection.

(v) The failure of a Dissenting Seller to materially comply with subparagraph (iv) above shall constitute a waiver of such Dissenting Seller's right to object to the proposed treatment and allowed amount of such Reclamation Claim unless the Court orders otherwise.

(vi) Any Seller who fails to return the Statement of Reclamation by the Reconciliation Deadline or who returns the Statement of Reclamation by the Reconciliation Deadline but fails to indicate assent or dissent shall be deemed to have assented to the Reconciled Reclamation Claim.

(c) Fixing the Reclamation Claim

(i) The Reclamation Claims of (i) all Sellers who return the Statement of Reclamation by the Reconciliation Deadline and indicate their assent to the Reconciled Reclamation Claim as contained in the Statement of Reclamation, (ii) all Sellers who fail to return the Statement of Reclamation by the Reconciliation Deadline and (iii) all Sellers who return the Statement of Reclamation by the Reconciliation Deadline but who fail to indicate either assent or dissent shall be deemed an Allowed Reclamation Claim in the amount of the Reconciled Reclamation Claim.

(ii) The Debtors are authorized to negotiate with all Dissenting Sellers and to adjust the Reconciled Reclamation Claim either upward or downward to reach an agreement regarding the Dissenting Seller's Reclamation Claim. In the event the Debtors and a Dissenting Seller are able to settle on the amount of the Dissenting Seller's Reclamation Claim, the Reclamation Claim shall be deemed an Allowed Reclamation Claim in the settled amount.

(iii) In the event that no consensual resolution of the Dissenting Seller's Reclamation Demand is reached within sixty (60) days of the Reconciliation Deadline, the Debtors shall file a motion for determination of the Dissenting Seller's Reclamation Claim and set such motion for hearing at the next regularly scheduled omnibus hearing occurring more than twenty (20) days after the filing of the motion for determination, unless another hearing date is agreed to by the parties or ordered by the Court (the "Determination Hearing"). The Dissenting Seller's Reclamation Claim, if any, shall be deemed an Allowed Reclamation Claim as fixed by the Court in the Determination Hearing or as agreed to by the Debtors and the Dissenting Seller prior to a determination by the Court in the Determination Hearing.

(d) Treatment of Allowed Reclamation Claims

(i) The Debtors may at any point in these Reclamation Procedures satisfy in full any Reclamation Claim or Allowed Reclamation Claim by making the Goods at issue available for pick-up by the Seller or Dissenting Seller.

(ii) All Allowed Reclamation Claims for which the Debtors choose not to make the Goods available for pick-up will be paid in full in 25% increments over four consecutive fiscal quarters, payments due on the first day of each fiscal quarter and beginning in the first fiscal quarter after the Reclamation Claim is allowed. To the extent that a plan of reorganization is confirmed prior to the completion of such payments, the balance of the payments still owed under this subparagraph shall be paid as an administrative expense pursuant to the terms of such plan.

3. All adversary proceedings, except those proceedings brought by the Debtors in accordance with these procedures (the “Reclamation Procedures”), in these cases relating to Reclamation Claims, whether currently pending or initiated in the future, shall be, and hereby are, stayed, and the claims asserted therein shall be subject to the Reclamation Procedures set forth herein.

4. The entry of this Order is conditional. Any party-in-interest may object to the entry of this Order within 10 days after the date of entry. If any such objection is timely filed, the objection shall be heard at the next regularly-scheduled omnibus hearing date. At the hearing, the Court may vacate this Order, modify or make it final. If no objection is filed within the 10-day period, the order shall become final at the conclusion of the 10-day period without further order of this Court. This Order shall remain in effect notwithstanding any objection until further order of this

Court. The modification or vacation of this Order shall not impair any action taken pursuant to it prior to its modification or vacation.

Dated: Alexandria, Virginia
August 12, 2002

/s/ Robert G. Mayer
UNITED STATES BANKRUPTCY JUDGE

WE ASK FOR THIS:

John Wm. Butler, Jr.
John K. Lyons
SKADDEN, ARPS, SLATE, MEAGHER
& FLOM (ILLINOIS)
333 West Wacker Drive, Suite 2100
Chicago, Illinois 60606-1285
(312) 407-0700

- and -

By: /s/ Lawrence E. Rifken
Lawrence E. Rifken (VSB No. 29037)
McGUIREWOODS LLP
1750 Tysons Boulevard, Suite 1800
McLean, Virginia 22102-4215
(703) 712-5000

Attorneys for Debtors and Debtors-in-Possession

EXHIBIT I

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

In re:	)	Chapter 11
)	
FAS MART CONVENIENCE	)	Procedurally Consolidated
STORES, INC., <u>et al.</u>,	)	Case No. Case No. 01-60386
)	
Debtors.)	

**ORDER PURSUANT TO SECTIONS 105 (a) AND 546(c)
OF THE BANKRUPTCY CODE APPROVING GLOBAL
PROCEDURES FOR RECONCILIATION OF RECLAMATION CLAIMS**

This matter comes before the Court on the Debtors' Motion Pursuant to Sections 105(a) and 546(c) Of The Bankruptcy Code For Approval Of Global Procedures For Reconciliation Of Reclamation Claims (the "Motion"). The Court having reviewed the Motion and having heard the statements of counsel in support of the relief requested therein at a hearing before the Court (the "Hearing"); the Court finding that (a) the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, (b) this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2), and (c) notice of the Motion (and proposed Order) was sufficient under the circumstances; and the Court being fully advised in the premises and having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; it is hereby

ORDERED as follows:

Bruce H. Matson, Esquire (Va. Bar No. 22874)
Lynn Lewis Tavenner, Esquire (Va. Bar No. 30083)
Paula S. Beran, Esquire (Va. Bar No. 34679)
LeCLAIR RYAN, A Professional Corporation
707 East Main Street, Suite 1100
Richmond, Virginia 23219
(804) 783-2003

Counsel for the Debtors

1. The Motion is hereby GRANTED.
2. Capitalized terms not otherwise defined herein shall have the meanings given to them in the Motion.
3. The Debtors shall be and hereby are, authorized to implement the Global Reclamation Procedures, as defined in the Motion, and as further defined and specified as follows:
 - a. Within 25 days after entry of the order approving the Global Reclamation Procedures, the Debtors will send to the counsel for the Reclamation Vendors, and, if none, the Reclamation Vendors a copy of such order and, to the extent that the Debtors have not reconciled the Reclamation Claim of the Reclamation Vendor, a letter (the "Document Request") requesting copies of all documents necessary to complete the reconciliation of such claim, including, without limitation, invoices, proofs of delivery or other documents.
 - b. The Reclamation Vendor shall submit the requested documentation to the Debtors so that it is received by the Debtors at the address indicated in the Document Request within 30 days of the date of the Document Request. Failure to respond to a Document Request in a timely fashion shall result in the disallowance of the Reclamation Claim unless the Debtors have, in writing, extended such deadline.
 - c. Within 115 days after the entry of the order approving the Global Reclamation Procedures, the Debtors will send to counsel for each Reclamation Vendor, and, if none, each Reclamation Vendor from whom they received a Reclamation Claim a report setting forth for that Reclamation Vendor (the "Reclamation Reports"); (i) the name of the vendor; (ii) the date of the Reclamation Claim; (iii) the applicable reclamation period for the Reclamation Vendor; (iv) the goods received by the Debtors during the applicable reclamation period, by invoice number, amount and date received to the extent practicable; (v) the goods still in the Debtors' possession on the date of the receipt of the Reclamation Claims by use of a "shelf life" analysis or otherwise; and (vi) the Debtors' determination as to the valid amount of the Reclamation Claim subject to the insolvency or other issues. The Debtors will consult with counsel for the Creditors' Committees prior to sending the Reclamation Reports and provide such counsel copies of the Reclamation Reports. The Debtors will file a schedule of the Reclamation Reports with the Court when the Reclamation Reports are provided to the Reclamation Vendors.

d. If a Reclamation Vendor disagrees with the Debtors' proposed amount of acceptable Reclamation Claim as indicated in the Reclamation Report, it must object within 15 days of the date the Reclamation Report by filing a written objection, specifying the grounds therefor, with the Court and serving the same on: (i) Thomas M. Terry, Fas Mart Convenience Stores, Inc. 1400 Mechanicsville Turnpike Richmond, VA 23111; (ii) Paula S. Beran, Esquire, LeCLAIR RYAN, A Professional Corporation 707 East Main Street, Suite 1100 Richmond, Virginia 23219; (iii) Paul M. Nussbaum, Esquire, WHITEFORD, TAYLOR & PRESTON L.L.P. Seven Saint Paul Street Baltimore, Md 21202-1626; and (iv) Douglas M. Foley, Esquire, MCGUIREWOODS, LLP, One James Center, 901 East Cary Street Richmond, VA 23219.

e. To the extent a Reclamation Vendor desires reasonable information from the Debtors concerning its Reclamation Claim, the Debtors shall provide reasonable information within 20 days from the date of a written request. If necessary and appropriate, a Reclamation Vendor may request that the Debtors conduct an inventory at the Reclamation Vendors expense.

f. If a timely objection is not filed by a Reclamation Vendor and served on each of the aforementioned parties, the amount of the Reclamation Claim of such vendor shall be deemed fixed in the amount set forth in the Reclamation Report as an administrative expense claim payable pursuant to the provisions of the Bankruptcy Code without further notice or hearing.

g. If a timely objection is filed and served, the Reclamation Claim will be resolved (i) consensually through a written stipulation between the Debtors and the objecting vendor, filed with the Court, and served on the general service list¹ (the "General Service List"²) or (ii) through a trial as a contested matter.

4. Notwithstanding the Debtors' waiver of their right to assert as a defense to reclamation that a Reclamation Vendor has failed to promptly commence or prosecute an adversary proceeding to enforce its Reclamation Claim, such waiver and the Global Reclamation Procedures shall be, and hereby are without prejudice to any and all other rights, claims and

¹ The general service list is defined in the Administrative Order Establishing Notice, Case Management And Hearing Procedures entered by this Court on March 9, 2001.

² Any stipulation filed with the Court shall be served on the General Service List. If no objections to such stipulation is filed within ten (10) days of service then such stipulation shall become effective without further notice or hearing.

defenses that the Debtors may have in respect of Reclamation Claims including, without limitation, issues pertaining to insolvency.

5. Pending the completion of the Global Reclamation Procedures, a stand still (the "Stand-Still") shall be in effect such that Reclamation Vendors are not required, and are stayed from taking steps to establish the validity and amount of their Reclamation Claims, including the commencement and continued prosecution of adversary proceedings, if any, except as provided by the Global Reclamation Procedures.

6. A copy of this entered Order shall be served by the Court via electronic delivery to those individuals/entities on the Court's electronic database for these cases, and if not otherwise served by the Court, by Debtors' counsel via first-class mail, postage prepaid to:

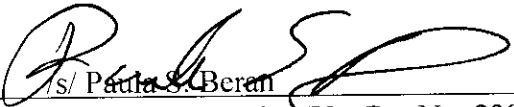
(a) the Office of the United States Trustee; (b) counsel for the Official Committee of Unsecured Creditors and each member of the Official Committee of Unsecured Creditors; (c) the Debtors' known secured creditors; (d) any known legal counsel for the Debtors' secured creditors; (e) any party requesting service of pleadings in these cases all as listed on the General Service List attached hereto as Schedule A; and (f) all Reclamation Vendors as listed on Schedule B attached hereto.

Enter: 8 / 14 /2001.


UNITED STATES BANKRUPTCY JUDGE

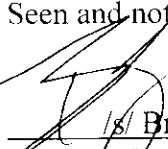
NOTICE OF JUDGMENT OR ORDER
Entered on Docket AUG 14 2001

We ask for this:


/s/ Paula S. Beran
Bruce H. Matson, Esquire (Va. Bar No. 22874)
Lynn Lewis Tavenner, Esquire (Va. Bar No. 30083)
Paula S. Beran, Esquire (Va. Bar No. 34679)
LeCLAIR RYAN, A Professional Corporation
707 East Main Street, Suite 1100
Richmond, Virginia 23219
(804) 783-2003

Counsel for the Debtors

Seen and not objected to:


/s/ Brent C. Strickland
Paul M. Nussbaum, Esquire
Brent C. Strickland, Esquire
Whiteford, Taylor & Preston, LLP
Seven Saint Paul Street
Baltimore, MD 21202-1626
(410) 347-8700

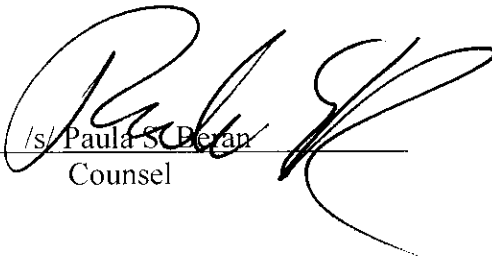
and

H. Slayton Dabney, Jr., Esquire (Va. Bar No. 14145)
Douglas M. Foley, Esquire (Va. Bar No. 34364)
McGuire, Woods, Battle & Boothe LLP
World Trade Center
101 West Main Street, Suite 9000
Norfolk, VA 23510-1655
(757) 640-3715

Counsel for the Official Committee of Unsecured Creditors

CERTIFICATION

I hereby certify that the foregoing proposed Order Pursuant to Sections 105(a) and 546(c) Of The Bankruptcy Code For Approval Of Global Procedures For Reconciliation Of Reclamation Claims has been endorsed by or served upon all necessary parties.



/s/ Paula S. Deran
Counsel

McLane Mid Atlantic
c/o Michael P. Falzone, Esquire
Hirschler, Fleischer, Weinberg, et al.
701 East Byrd Street, P. O. Box 500
Richmond VA 23218-0500

B. Amon James, Esquire
Acting, Assistant U. S. Trustee
Office of the United States Trustee
11 South 12th Street, Suite 224
Richmond, Virginia 23219

Franchise Mortgage Acceptance Co.
c/o James M. Nolan, Esquire
Trautman, Sanders, Mays & Valentine
1111 East Main Street
P. O. Box 1122
Richmond, VA 23218

JP Morgan Chase Securities, Inc.
c/o Larren M. Nashelsky, Esq.
Morrison & Foerster
1290 Avenue of the Americas
New York, NY 10104-0050

Frank B. Bradley, III, President
The Beale Company of Virginia, Inc.
Post Office Box 217
Mechanicsville, VA 23111

Raymond Galkowski
Financial Security Assurance
350 Park Avenue
New York, NY 10022

Gail G. Roberts, Esquire
County Attorney's Office
P. O. Box 339
Stafford, VA 22555-0339

William A. Broschious, Esquire
Kepley & Broschious
7201 Glen Forest Drive, Suite 102
Richmond, Virginia 23226

Attn: Legal Department
Marva Maid Dairy
5500 Chestnut Avenue
P. O. Box 5145
Newport News, VA 23605-2118

John P. McDonagh
J.P. Morgan Chase & Co.
380 Madison Avenue, 9th Floor
New York, NY 10017-2591

Bank of America
c/o Peter G. Zemanian, Esquire
1800 Bank of America Center
One Commercial Place
Norfolk, VA 23510-2197

Fas Mart Petroleum
c/o Kevin R. Huennekens, Esq.
Kutak Rock, LLP
1111 East Main Street, Suite 800
Richmond, Virginia 23219

Lehman Brothers
c/o Jeffrey L. Schwartz, Esquire
Hahn & Hessen LLP
350 Fifth Avenue
New York, NY 10118-0075

Motiva Enterprises, LLC
c/o Tyler P. Brown, Esquire
Hunton & William
Riverfront Plaza – East Tower
951 East Byrd Street
Richmond, VA 23219

Errol Uhr
Financial Security Assurance
350 Park Avenue
New York, NY 10022

Richard G. King, President
Utz Quality Foods, Inc.
P. O. Box 338
900 High Street
Hanover, PA 17331

Augustus C. Epps, Jr., Esquire
Christian & Barton, LLP
909 East Main Street, Suite 1200
Richmond, Virginia 23219-3095

David Hopper, Esquire
Alan Buffenstein, Esquire
McCandlish & Kaine
1111 East Main St., Suite 1500
Richmond, VA 23219

BP Amoco
c/o James S. Carr, Esquire
Kelley Drye & Warren, LLP
101 Park Avenue
New York, NY 10178

Dominion Virginia Power
c/o Russell R. Johnson, III, Esq.
3734 Byfield Place
Richmond, VA 23233

Frank Bradley
The Beale Company of Virginia
Post Office Box 217
Mechanicsville, Virginia 23111

Cynthia Tucker
FMAS
Three American Lane
Greenwich, CT 06831

Clive D. Bull
JP Morgan Chase Securities, Inc.
60 Wall Street
New York, NY 10260-0060

Motiva Enterprises, LLC
Shari L. Heyen
Gregory C. Ulmer
Baker & Hostetler, LLP
1000 Louisiana, Suite 2000
Houston, Texas 77002

Peter Kern
Lehman Brothers
3 World Financial Center
New York, NY 10022

Raymond R. Pring, Jr.
Gold Morrison & Laughlin, P.C.
1660 International Drive, Suite 450
McLean, VA 22102-4848

Carl T. Anderson, Esquire
Paul Hastings Janofsky & Walker, LLP
555 South Flower Street
23rd Floor
Los Angeles, CA 90071

John D. McIntyre
Willcox & Savage, P.C.
1800 Bank of America Center
One Commercial Place
Norfolk, VA 23510-2197

Citgo Petroleum
c/o Peter S. Partee, Esquire
Hunton & Williams
951 East Byrd Street
Richmond, VA 23219-4074

Marva Maid Dairy
c/o Robert M. Marino, Esq.
Reed Smith LLP
1301 K Street, NW, #1100 – East Tower
Washington, D.C. 20005-3317

McLane Company, Inc.
c/o Gregory G. Hesse
Jenkins & Gilchrist
1445 Ross Avenue, Suite 3200
Dallas, Texas 75202-2799

Kim Martin-Lewis, Esq.
The Proctor & Gamble Distributing Co.
One Proctor & Gamble Plaza
Attn: Jason P. Muncy (Legal Division)
Cincinnati, OH 45202

Richard W. Stiteler
Eastern Group Credit Advisor
Coca-Cola Enterprises, Inc.
The Mid-Atlantic Coca-Cola Bottling Co.
9770 Patuxent Woods Drive
Columbia, MD 21046

Michael T. Bevilacqua, Manager
Accounts Receivable
Pepsi Bottling Group, LLC
1100 Reynolds Blvd.
Winston-Salem, NC 27105

Linda Merryman
Credit / Account Receivable Manager
Cloverland / Green Spring Dairy
2701 Loch Raven Road
Baltimore, MD 21218

William H. Schwarzschild, III, Esq.
Williams, Mullen Clark & Dobbins
1021 East Cary Street
Richmond, VA 23218-1320

H. Slayton Dabney, Jr., Esquire
Douglas M. Foley, Esquire
McGuire Woods
One James Center
901 East Cary Street
Richmond, Virginia 23219

Paul M. Nussbaum, Esquire
Whiteford, Taylor & Preston, LLP
Seven Saint Paul Street
Baltimore, MD 21202-1626

Robert Marshall, Esquire
Waters McPherson McNeill
300 Lighting Way
Secaucus, NJ 07096

A. Carter Magee, Jr., Esquire
Magee Foster Goldstein & Sayers, P.C.
P. O. Box 404
Roanoke, VA 24011

Ross Buntrock, Esquire
Kelley Drye & Warren, LLP
1200 19th Street, N.W., Suite 500
Washington, DC 20036

Kelly H. Scoffield, Esquire
ExxonMobil Corporation
3225 Gallows Road
Room 3D-0634 – Law Dept.
Fairfax, VA 22037

Douglas M. Foley, Esquire
McGuire Woods
9000 World Trade Center
101 West Main Street
Norfolk, Virginia 23510

Sheri M. Graves
The Coca-Cola Company
P. O. Box 1734, USA 733
Atlanta, GA 30301

Borden R. Bowen
c/o David K. Spiro, Esquire
823 East Main Street, 15th Floor
Richmond, VA 23218-0561

T. Wayne Biggs, Esquire
Mark R. Dycio, P.C.
10615 Judicial Drive, Suite 101
Fairfax, Virginia 22030

Stephanie W. Frye
C/o Glenda Clausell
Equiva Services LLC
910 Louisiana
One Shell Plaza Room 771
Houston, TX 77002

Stuart Hirshfield, Esquire
Dewey Ballantine
1301 Avenue of the Americas
27th Floor
New York, NY 10019

CACI, Inc. – Federal
dba CACI Marketing Systems
Attn: Marjorie Crossman
1100 N. Glebe Road
Arlington, VA 22201

Waste Management, Inc.
c/o Gregory S. Duncan, Esquire
412 East Jefferson Street
Charlottesville, VA 22902

Atlantic Bank
c/o Mark R. Lewis, Esquire
6400 Arlington Boulevard
Suite 420
Falls Church, Virginia 22042-2336

Citicorp Vendor Finance, Inc.
c/o James S. D. Eisenhower, III
Eisenhower & Laufer, P.C.
10476 Armstrong Street
Fairfax, Virginia 22030

Schedule B

Reclamation Vendors

<u>Company Name</u>
Citgo Petroleum Corp. PO Box 3758 Tulsa, Oklahoma 74102
Coca-Cola Enterprises, Inc. t/a The Mid Atlantic Coca-Cola Bottling Co. 9770 Patuxent Woods Dr., Columbia, MD 21046
Frito Lay, Inc. PO Box 660059 Dallas Texas 75266-0053
Krispy Kreme Doughnut Corp. PO Box 83 Winston Salem, NC 27102
Marva Maid Dairy 5500 Chestnut Avenue Newport News, Va. 23605
McClane Company, Inc. 4747 McLane Parkway Temple, Texas 76503
Pepsi-Cola Bottling Co. Of Salisbury c/o A. Gillis Allen, II 207 Downtown Plaza PO Box 990 Salisbury, Maryland 21803
Pepsi-Cola 1100 Reynolds Boulevard PO Box 10 Winston Salem, NC 27102
Tosco Refining Company 1400Park Avenue Lincoln, NJ 07036

EXHIBIT J

McGUIREWOODS LLP
H. Slayton Dabney, Jr., Esq. (VSB No. 14145)
Douglas M. Foley, Esq. (VSB No. 34364)
One James Center
901 East Cary Street
Richmond, VA 23219
(804) 775-1000
- and -
WILLKIE FARR & GALLAGHER
Paul V. Shalhoub, Esq.
787 Seventh Avenue
New York, NY 10019-6099
(212) 728-8000

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

In re)	
	)	Case No. 00-34533 through
HEILIG-MEYERS COMPANY, <u>et al.</u>,	)	00-34358
)	
Debtors.	)	Chief Judge Douglas O. Tice, Jr.
)	
	)	(Chapter 11 cases) (jointly administered)

**ORDER PURSUANT TO SECTIONS 105 (a) AND 546(c)
OF THE BANKRUPTCY CODE FOR APPROVAL OF GLOBAL
RECLAMATION PROCEDURES FOR RECLAMATION CLAIMS**

Upon the Motion dated November 16, 2000 (the "Motion") of Debtors, as debtors in possession, for an order, pursuant to sections 105(a) and 546(c) of title 11 of the United States Code, for approval of global reclamation procedures for reclamation claims, all as more fully set forth in the Motion (the "Global Reclamation Procedures"); and it appearing that the Court has jurisdiction over this matter; and it appearing that due notice of the Motion has been provided to the Office of the United States Trustee, the attorneys for the statutory committee of unsecured creditors and equity holders appointed in these chapter 11 cases, all Reclamation Vendors from whom the Debtors have received a Reclamation Claim, as such terms are defined in the Motion,

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and those persons requesting notice in these chapter 11 cases pursuant to Rule 2002 of the Federal Rules of Bankruptcy Procedure, and that no other or further notice need be provided; and it further appearing that the relief requested in the Motion is in the best interests of the Debtors and their estates and creditors; and upon all of the proceedings had before the Court; and after due deliberation and sufficient cause appearing therefor, it is

ORDERED that the Debtors shall be, and hereby are, authorized to implement the Global Reclamation Procedures, as defined in the Motion, and as further defined and specified as follows :

1. Within 25 days after entry of the order approving the Global Reclamation Procedures, the Debtors will send to the Reclamation Vendors a copy of such order and, to the extent that the Debtors have not reconciled the Reclamation Claim of the Reclamation Vendor, a letter (the "Document Request") requesting copies of all documents necessary to complete the reconciliation of such claim, including, without limitation, invoices, proofs of delivery or other documents.
2. The Reclamation Vendor shall submit the requested documentation to the Debtors within 60 days of the date of the Document Request. Failure to respond to a Document Request in a timely fashion shall result in the disallowance of the Reclamation Claim unless the Debtors have, in writing, extended such deadline or a motion has been filed prior to such deadline by a Reclamation Vendor.
3. Not later than 90 days after expiration of the period described in paragraph (2) above, the Debtors will send each Reclamation Vendor from whom they received a Reclamation Claim a report setting forth for that Reclamation Vendor (the "Reclamation Reports"); (i) the name of the vendor; (ii) the date of the Reclamation Claim; (iii) the applicable reclamation period for the Reclamation Vendor; and (iv) the goods received by the Debtors during the applicable reclamation period, by invoice number or purchase order number, amount and date received to the extent practicable; (v) the goods actually still in the Debtors' possession on the date of the receipt of the Reclamation Demand if this can be determined by the Debtors; otherwise, the Debtors will provide a good faith estimate of the goods actually in the Debtors' possession on the date of receipt of the Reclamation Demand along with a detailed explanation of the basis for such estimate; and (vi) the Debtors' determination as to the valid amount of the Reclamation Claim subject to insolvency or other issues. The Debtors will consult with counsel for the Equity and Creditors' Committees prior to sending the Reclamation Reports and provide such counsel copies of the Reclamation Reports. The Debtors will file a schedule of the Reclamation Reports with the Court when the Reclamation Reports are provided to the Reclamation Vendors.

4. If a Reclamation Vendor disagrees with the Reclamation Claim as indicated in the Reclamation Report, it must object within 45 days of the date it received the Reclamation Report by filing a written objection, specifying the grounds therefor, with the Court and serving the same on (i) Douglas M. Foley, Esq. and Erin McDonald, Esq., McGuireWoods, LLP, One James Center, 901 East Cary Street Richmond, VA 23219 and Paul V. Shalhoub, Esq., Willkie Farr & Gallagher, 787 Seventh Avenue, New York, New York 10019-6099, and (ii) Robert Thornhill, Heilig-Meyers Furniture Company, 12560 West Creek Parkway, Richmond, VA 23238; (iii) Michael Stamer, Esq. at Akin, Gump, Strauss, Hauer & Feld, L.L.P., 590 Madison Avenue, 20th Floor, New York, New York 10022; and (iv) Peter S. Partee, Esq., Hunton & Williams, Riverfront Plaza, East Tower, 951 East Byrd Street, Richmond, Virginia 23219

5. If a timely objection is not filed by a Reclamation Vendor and served on each of the aforementioned parties, the amount of the Reclamation Claim of such vendor shall be deemed fixed in the amount set forth in the Reclamation Report as an administrative expense claim payable pursuant to the provisions of the Bankruptcy Code without further notice or hearing. Upon the filing of a timely objection in accordance with the procedures set forth herein, the Stand-Still (as defined below) would be immediately and automatically lifted and Reclamation Vendors would have all rights available to them under the law to establish the validity and amount of their Reclamation Claims, including the commencement of adversary proceedings.

6. If a timely objection is filed and served, the Reclamation Claim will be resolved (i) consensually through a written stipulation between the Debtors and the objecting vendor, filed with the Court, and served on the Limited Service List¹ or (ii) through a trial as a contested matter.

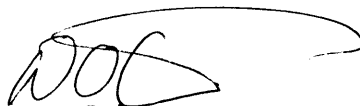
and it is further

ORDERED that notwithstanding the Debtors waiver of their right to assert as a defense to a Reclamation Claim that a Reclamation Vendor has failed to promptly commence or prosecute an adversary proceeding to enforce its Reclamation Claim, such waiver and the Global Reclamation Procedures shall be, and hereby are without prejudice to any and all other rights, claims and defenses that the Debtors may have in respect of a Reclamation Claim including, without limitation, issues pertaining to insolvency, and it is further

¹ Any stipulation filed with the Court shall be served on the Limited Service List. If no objections to such stipulation is filed within ten (10) days of service then such stipulation shall become effective without further notice or hearing.


ORDERED that pending completion the Global Reclamation Procedures, a stand-still (the "Stand-Still") shall be in effect such that Reclamation Vendors are not required, and are stayed, from taking steps to establish the validity and amount of their Reclamation Claims, including the commencement and continued prosecution of adversary proceedings, except as provided by the Global Reclamation Procedures.

Dated: January ¹¹11, 2001
Richmond, Virginia



DOUGLAS O. TICE, JR.
CHIEF UNITED STATES BANKRUPTCY JUDGE

WE ASK FOR THIS:



/s/ Douglas M. Foley
McGUIREWOODS LLP
H. Slayton Dabney, Jr., Esq. (VSB No. 14145)
Douglas M. Foley, Esq. (VSB No. 34364)
One James Center
901 East Cary Street
Richmond, VA 23219
(804) 775-1000
- and -
WILLKIE FARR & GALLAGHER
Paul V. Shalhoub, Esq.
787 Seventh Avenue
New York, NY 10019-6099
(212) 728-8000

NOTICE OF JUDGEMENT OR ORDER

Entered on Docket **JAN 11 2001**